Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 752)

Supreme Court of the United States

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER,

vs.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

PETITION FOR CERTIORARI FILED JULY 24, 1954

CERTIORARI GRANTED OCTOBER 14, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 10

COMMONWEALTH OF PENNSYLVANIA,
PETITIONER,

vs.

STEVE NELSON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA, WESTERN DISTRICT

VOL. I

INDEX

	Original	Print
Record from the Court of Quarter Session of Allegheny County, Pennsylvania	1	1
Docket entries on first trial	1	1
Motion for change of venue and denial thereof	2a	2
Docket entries on second trial	3	7
Indictment	6	9
Verdict	20	22
Verdict on first trial	21	23
Defendant's motions	22	23
Motion to quash indictment	23	24
Order dismissing motion to quash indictment	28	28
Motion for new trial (omitted in printing)	30	
Motion in arrest of judgment (omitted in printing)	34	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 14, 1955

—2432-3

	Original	Print
Record from the Court of Quarter Session of Allegheny County, Pennsylvania—Continued		
Supplemental motion for new trial and in arrest of judgment (omitted in printing)	36	
(illegible)		
Motion for amendment to supplementary motion for new trial and in arrest of judgment (omitted in printing	45	
Order correcting testimony (omitted in printing)	47	
Opinion denying motions for new trial and in arrest of judgment, Montgomery, J.	49	28
Order refusing motions for new trial and in arrest of Judgment	74	49
Statement of questions to be argued (omitted in printing)	76	
Docket entries (omitted in printing)	84	
Proceedings in the Superior Court of Pennsylvania	91	50
Opinion, per curiam	91	50
Proceedings in the Supreme Court of Pennsylvania, Western District	92	50
Opinion, Jones, J.	92	50
Concurring opinion, Stern, C. J., Stearne, J., and Chidsey, J.	107	64
Dissenting opinion, Bell, J.	108	64
Petition for leave to appeal from judgment of Superior Court to Supreme Court (omitted in printing)	140	
Indictment (copy) (omitted in printing)	162	
Opinion denying motions for new trial and in arrest of judgment (copy) (omitted in printing)	171	
Opinion of the Superior Court (copy) (omitted in printing)	197	
Order granting leave to appeal (omitted in printing)	198	
Answer to petition for leave to appeal (omitted in printing)	199	
Petition of District Attorney for re argument (omitted in printing)	227	
Petition of Commonwealth of Pennsylvania for reargument (omitted in printing)	244	
Praecipe for record (omitted in printing)	269	
Judge's and Clerk's certificates (omitted in printing)	272	
Transcript of official notes of proceedings	1	93
Counsel present	1	93
Motion for postponement and denial thereof	3	94
Colloquy between Court and defendant	16	100
Submission of affidavit of physical condition of defendant	22	102
Resubmission of motion to dismiss, etc.	33	107
Colloquy between Court and defendant	40	110
Continuances	88	132
Denial of motion to disqualify judge	94	135

	Original	Print
Transcript of official notes of proceedings—Continued		
Refusal of motion for continuance because of lack of Counsel	101	138
Refusal of motion for change of venue	101	138
Motion to appoint attorney and denial thereof	101	138
Motion to quash and dismiss indictment and denial thereof	105	140
Motion to dismiss jury panel and denial thereof	114	141
Voir dire examination of jurors (omitted in printing)	122	
Motion for continuance and denial thereof	441	150
Opening statement of Mr. Cercone	445	152
Testimony of Joseph Becker	478	166
Michael A. Musmanno	497	177
Paul Crouch	1164	536
Leonard Patterson	1332	634
Charles H. White	1368	656
Leonard Patterson (recalled)	1391	671
Charles H. White (recalled)	1418	686
Matthew Cvetic	1431	694
VOL. II		
Colloquy between Court and counsel	1649	818
Testimony of Matthew Cvetic (resumed)	1654	820
State rests	1741	865
Motion to strike testimony and exhibits and denial thereof	1742	866
Motion to strike testimony and exhibits and denial thereof	1746	868
Motion to quash indictment and denial thereof	1747	869
Motion for mistrial and denial thereof	1766	876
Colloquy between Court and counsel	1769	877
Statement by Mr. Nelson	1776	880
Testimony of Dr. Herbert Aptheker	1827	911
Herman E. Sayer	2206	1135
Testimony of Dr. Herbert Aptheker (recalled)	2217	1141
George Seibel	2252	1162
Benjamin L. Careathers	2258	1165
Defendant rest	2376	1232
Motion to strike testimony and denial thereof	2379	1233
Transcript of argument and charge	2381	1234
Motion for mistrial and denial thereof	2381	1234
Motion to strike indictment and denial thereof	2382	1234
Motion for mistrial and denial thereof	2386	1236
Colloquy between Court and counsel	2387	1236
Statement of Mr. Nelson to jury	2396	1240
Statement of Mr. Cercone to jury	2529	1316
Oral charge by the Court	2660	1388
Order granting petition for writ of certiorari	2715	1421

[fol 1]

IN THE COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY, PENNSYLVANIA

Court of Quarter Sessions met Friday, January 12, 1951 at 9:30 o'clock A. M.

Present: Honorable Thomas M. Marshall, Honorable Clarence B. Nixon, Honorable Henry Ellenbogen, Honorable Henry X. O'Brien, Honorable Sara M. Soffel, Honorable Harry M. Montgomery, Honorable Walter P. Smart.

Specially Sitting

Honorable Ivan J. McKenrick, 47th Judicial District
Court Opened by the Crier—John S. Englert

COMMONWEALTH

vs.

STEVE NELSON, Alias Louis Evans, Joseph Fleischinger, "Hugo", Steve Mesarosh

No. 764. October Sessions, 1950. True Bill

Charge: Sedition.
Judge: O'Brien.
Dist. Atty.: Lewis.
Deft. Atty.: McTernan, Schlesinger.
Pros: Musmanno.

DOCKET ENTRIES ON FIRST TRIAL

December 23, 1950. Motion to Quash Indictment.

December 26, 1950. Order of Court Dismissing Motion to Quash Indictment:

And now, January 12, 1951, Defendant Steve Nelson terminated the services of his present Attorneys, John T. McTernan and Hymen Schlesinger, and agreed to by the Court.

January 12, 1951, Defendant Steve Nelson present in Open Court pleads non cul et de hoc. District Attorney Similiter. Issue joined. Eo die, a jury called, there came, James M.

[fol. 2] O'Malley, Emelia E. Beiter, Joseph Kirby, Zelma R. Scott, Irma L. Paczik, Marian N. Jocheim, Margaret E. Gaetner, Leah Corbett, Mary L. Coulter, Emma M. Haupt, Carl G. Boswell, Frank D. Gustafason, twelve good and lawful men and women, also Beatrice E. Workmaster and Virginia Smith, alternates, duly summoned, returned, elected by ballot, impaneled and sworn, who upon their solemn oaths respectively do say: March 2, 1951, James M. O'Malley, No. 1 Juror reported sick, and excused from serving on this jury. Beatrice E. Workmaster the first alternate juror selected, was directed by the Court to take James O'Malley's place on the Jury.

May 22, 1951 in Open Court, it is hereby ordered by the Court that a Juror be withdrawn as to defendant Steve Nelson and case continued.

[fol. 2a] In the Court of Quarter Sessions of Allegheny County, Pennsylvania

[Title omitted]

Motion for Change of Venue and Denial Thereof—December 17, 1951

The defendant moves for Change of Venue on the following grounds and reasons:

1. Reluctance and open unwillingness on the part of the 7[illegible]00 members of Allegheny County Bar Association to come into my case and defend me.

2. The unfavorable publicity in the Press, especially extending from the past trial.

3. The campaign in the press and radio against the Communist Party which has been magnified as a result of the war hysteria.

4. Because of role of Judge Michael A. Musmanno in this Court where he has tremendous influence over the Judges, and the District Attorney's Office.

5. Because defendant has figured in previous trial in which his co-defendants have been convicted.

6. Because defendant faces a similar charge in Federal Court on the Smith Act.

7. Because there was much unfavorable publicity around question of exorbitant bail.

For reasons sighted above as well as reasons presented in affidavits in the first trial at the time of showing of Cvetic film, defendant moves for a Change of Venue for without it he is denied a chance for a fair and impartial trial.

Respectfully submitted, (Signed) Steve Nelson.

Filed: December 17, 1951

And now, December 17, 1951, the above motion is refused and ordered filed.

By the Court, HM, J.

[fol. 2b] In the Court of Quarter Sessions of Allegheny County

No. 764, October Sessions, 1950
No. 763, October Sessions, 1950
No. 762, October Sessions, 1950

Commonwealth of Pennsylvania,

v.

Steve Nelson, Andy Onda, James Dolsen

Petition for Change of Venue

To the Honorable, the Judges of Said Court:

The defendants named above, each for himself, applies for an order of this court in each of the above cases changing the venue of the trial of each of the defendants on the indictment respectively found against him and transferring said case for trial to the appropriate court of an appropriate county other than the County of Allegheny and in support thereof respectfully shows

1. There exists in the County of Allegheny and the City of Pittsburgh a strong public passion and prejudice against each of the defendants and the Communist Party, in which the defendants have been identified, including each of the defendants herein, are regarded as conspirators seeking to bring about the overthrow of the government of the United

States and of the State of Pennsylvania by force and violence, agents of a foreign power, spies in the service of a foreign power, saboteurs and terrorists, and are therefore regarded as *per se* guilty of violations of the statute upon which these prosecutions are based and of the charges made in the indictments herein; said passion and prejudice is so strong and pervasive in said county and city that none of the defendants can obtain a fair trial upon said indictments; said passion and prejudice has resulted from a campaign conducted by the private prosecutor herein, Judge Musmanno of this Court, and in the daily newspapers and radio in the City of Pittsburgh and the County of Allegheny in the course of which opinions that the defendants are guilty of the charges here at issue have been repeatedly made and much of the alleged evidence to be adduced in support of the charges in the indictments herein has been referred to and reviewed in the daily newspapers and radio; [fol. 2c] the private prosecutor herein, the aforesaid Judge Musmanno of this Court, has made statements carried in the press and over the radio on all of the foregoing matters, and in particular, but without limitation, that the defendants are guilty of the charges in the indictments herein, and that on such occasions the said Judge Musmanno has been identified in the press and on the radio in connection therewith as a judge of this Court and has thus lent the weight, prestige and authority of his judicial position to the view that the defendants are guilty of the charges made in the indictments herein; that said passion and prejudice has further been created and fostered by the activities of Judge Gunther of the County Court and Superior Court, while acting as a director of an organization known as "Americans Battling Communism" demanding the prosecution of Communists for sedition and by an opinion delivered by Judges Marshall and Ellenbogen of this Court in which they find, in the absence of a trial of the issue before them, that the Communist Party is an illegal conspiracy dedicated to the overthrow of government by force and violence; and said campaign of passion and prejudice has been so stirred up in the community generally as to result in the formation of a community judgment that persons connected with the Communist Party by witnesses testifying before legislative committees and without confrontation or

cross-examination are regarded and treated as social, political and economic outcasts ineligible for public service or private employment, that as a result of the passion and prejudice so created, it will be impossible for any body of jurors in this case at this time to apply to these defendants the presumption of innocence, to require of the prosecution that it establish guilt beyond a reasonable doubt or to find a verdict of not guilty if the prosecution fails to sustain a burden of proof solely for the reason that the community pressure operating upon such jurors, economically, politically and socially, will be such that they will dare to do [fol. 2d] nothing except to find these defendants guilty; the purport and content of the articles and statements carried in the said daily press and over the said radio are set forth in defendants' Petition for Continuance of Trial Date filed in the above cases on Page 9 thereof beginning with Paragraph (a) to and including Page 21 thereof, Paragraph (y), and the averments of the aforesaid portions of said Petition are by this reference incorporated herein as fully as if set forth *in haec verba* at this point.

2. There exists in the City of Pittsburgh and the County of Allegheny a combination against each of the defendants instigated by influential persons by reasons of which none of defendants can obtain a fair trial in this court; said combination of influential persons includes Judge Musmanno of this court; William S. Rahauser and Loran L. Lewis, District Attorney and Assistant District Attorney, respectfully, of Allegheny County; W. W. Forster, Editor of the Pittsburgh Press; Paul Block, Jr. and William Block, Publishers, and Andrew Bernhard, Editor, of the Pittsburgh Post-Gazette; Edward Becker, Publisher, and Robert Wylie, Editor of the Pittsburgh Sun-Telegraph, and divers other influential persons whose names and identities are not now known to defendants; said combination has caused, created, cultivated and continued the public passion and prejudice alleged in Paragraph 1 hereof, and the averments of said Paragraph 1 are by this reference incorporated in this Paragraph 2 as fully as if set forth *in haec verba* at this point; said combination has further caused and resulted in the use and abuse of the processes of this Court and the consequences thereof are as set forth in Paragraphs 3, 4 and 5 of defendants' Petition of Continuance of Trial Date,

filed in these cases and the averments of said Paragraphs 3, 4 and 5 are by this reference incorporated herein as fully as if set forth *in haec verba* at this point.

[fol. 2e] Wherefore: Each of defendants prays that this court make and enter its order changing the venue of the trial of each of defendants on the indictment respectfully found against him and transferring each said case for trial to the appropriate court of an appropriate county other than the County of Allegheny.

Respectfully submitted, ——— ———, ——— ———, Attorneys for Defendants, Above Named.

[fol. 2f] STATE OF PENNSYLVANIA,
County of Allegheny, ss:

Steve Nelson being duly sworn according to law deposes and says that the facts set forth herein are true and correct to the best of his knowledge, information and belief.

(Signed) Steve Nelson.

Filed: December 17, 1951.

Sworn to and subscribed before me this 17th day — December, 1950. Harry I. Lutz, Acting Clerk of Courts.

[fol. 3] In the Court of Quarter Sessions of Allegheny County, Pennsylvania

Court of Quarter Sessions met Wednesday, December 18, 1951 at 9:30 o'clock A. M.

Present: Honorable Michael A. Musmanno, Honorable Harry M. Montgomery, Honorable John J. Kennedy, Honorable Russell H. Adams, Honorable John Drew, Honorable Clarence B. Nixon.

Court Opened by the Assistant Crier—Samuel Mawhinney

Commonwealth,

vs.

Steve Nelson, Alias Louis Evans, Joseph Fleishinger, "Hugo", Steve Mesarosh

No. 764. October Sessions, 1950. True Bill

Charge: Sedition.
Judge: Montgomery.
Dist. Atty.: Lewis, Cercone.
Deft. Atty.: Glick.
Pros.: Musmanno.

Docket Entries on Second Trial

And now December 18, 1951 defendant Steve Nelson present in Open Court with Counsel pleads Not Guilty. Issue joined by District Attorney. Eo die, a jury called there came: Alice Cookman, Frank J. Smith, Lulu Engler, George A. Roman, James W. McCoy, Henry A. Werner, Myrtle English, Elizabeth A. Kopil, Charles G. Cochran, J. Thomas L. Bixby, M. Ernest Pochlman, James H. Blair, twelve good and lawful men and women, and also Henrietta Bradwell and Edward L. Price, two Alternates, duly summoned, returned, elected by ballot, impaneled and sworn, who upon their solemn oaths respectively do say:

January 30, 1952 that they do find the defendant, Guilty [fol. 4] of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Nineth, Eleventh, and Twelfth Counts of the Indictment and so say they all. Eo die, defendant acting

as his own Counsel asked the Court for a poll of the Jury, whereupon the Clerk polled the Jury and each and every Juror announced their verdict as "Guilty on all counts of the Indictment."

January 31, 1952 the Jury having been polled at the request of the defendant, and all Jurors affirming the verdict of "Guilty on all counts", and the Verdict having been recorded as "Guilty in all counts"; the Verdict is hereby moulded to include a finding of Guilty on Count 10, as well as all others, same being inadvertendently omitted by the Court, H. M. Montgomery.

January 31, 1952 Motion for New Trial.

January 31, 1952 Motion in Arrest of Judgment.

February 14, 1952 Motion for a New Trial and Arrest of Judgment argued before Judges Montgomery, Adams and Bauer. Briefs to be filed by April 20, 1952.

April 14, 1952 Supplementary Motion for a New Trial and Arrest of Judgment allowed to be filed this date Nunc Pro Tunc.

May 1, 1952 Motion for Amendment to Supplementary Motion for New Trial and Arrest of Judgment.

June 5, 1952 Order of Court-Stenographic Errors in Written Testimony.

June 26, 1952 Motion for a New Trial and Arrest of Judgment is hereby refused; Opinion and Order of Judge Montgomery filed. Defendant is directed to appear before the Court for sentence, forthwith.

June 26, 1952 defendant present in Open Court for sentence, Barney Phillips, Esq., appointed Counsel to represent defendant, defendant consenting thereto. Upon motion of Counsel for defendant at the request of the defendant, sentence postponed until Thursday July 10, 1952. Bond ordered cancelled and defendant committed to jail to await further disposition.

[fol. 5] July 10, 1952 defendant sentenced to pay a fine of $10,000 to the Commonwealth, pay costs of prosecution and undergo an imprisonment of 20 years in the Allegheny County Workhouse and stand committed. Date of last commitment June 26, 1952.

July 29, 1952 Appeal to Superior Court No. 170 April Term, 1952.

August 30, 1952 Statement of Questions to be argued pursuant to Rule 22.

September 3, 1952 defendant ordered and directed to be released from Allegheny County Jail, in custody of the Sheriff and to be committed to Allegheny County Workhouse to serve the sentence imposed on July 16, 1952 at No. 764 October Sessions, 1950.

[fol. 6] IN THE COURT OF QUARTER SESSIONS OF THE PEACE FOR THE COUNTY OF ALLEGHENY OF OCTOBER SESSIONS, 1950

No. 764

INDICTMENT—October 17, 1950

ALLEGHENY COUNTY, ss:

The Grand Inquest of the Commonwealth of Pennsylvania now inquiring in and for the County of Allegheny, upon their oaths and solemn affirmations, respectively; do present, that Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh late of the County aforesaid, on the nineteenth day of July in the year of our Lord one thousand nine hundred and fifty and on divers days and times prior thereto at the County aforesaid, and within the jurisdiction of this Court, unlawfully and feloniously did then and there encourage divers persons, whose name and names are to this Inquest unknown, to take certain measures and engage in certain conduct with a view of overthrowing and destroying by force and by a show and threat of force, the Government of this State and of the United States of America, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Inquest aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at

the County aforesaid and within the jurisdiction of this Court unlawfully and feloniously did incite and encourage a certain person and persons whose name and names are to this Inquest unknown to commit an overt act and overt acts with a view to bringing the Government of this State and of the United States of America into hatred and contempt, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania

[fol. 7] And the Inquest aforesaid upon their oaths and solemn affirmation aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did incite and encourage a certain person and persons whose name and names are to this Inquest unknown to commit an overt act and overt acts with a view to bringing the Government of this State and of the United States of America into hatred and contempt by a certain writing and writings, publication and publications, printing and printings, cut and cuts, cartoon and cartoons and utterance and utterances which advocate and teach the duty, necessity and propriety of engaging in crime, violence and other forms of terrorism, as a means of accomplishing political reform and change in government, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania

And the Inquest aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did incite and encourage a certain person and persons whose name and names are to this Inquest unknown to commit an overt act and overt acts with a view to bringing the Government of this State and of the Government of the United States of America into hatred and contempt by the sale, gift and distribution of certain prints, publications, books, papers, documents and written

matter, which advocates, furthers and teaches the crime of sedition, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania

[fol. 8] And the Inquest aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there organize and did help to organize and did become a member of an assembly, society and group, the policies and purposes of said assembly, society and group being seditious, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Inquest aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there individually and in connection and combination with another person and other persons whose name and names are to said Inquest unknown, make and publish and distribute and cause to be made and published and distributed and have in his possession with intent to publish and distribute and for another purpose, a certain writing, publication, printing, cut and cartoon, and did make certain utterances and was guilty of conduct the intent of which was and is to make and cause to be made an outbreak and demonstration of violence against the State of Pennsylvania and against the United States, contrary to the form of the Act of General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania

[fol. 9] And the Inquest Aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid,

at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there individually and in connection and combination with another person and persons, whose name and names are to said Inquest unknown, make and publish and distribute and cause to be made and published and distributed and have in his possession with intent to publish and distribute, a certain writing, publication, printing, cut and cartoon and did make certain utterances and was guilty of conduct, the intent of which was and is to encourage a certain person and certain persons, whose name and names are to this Inquest unknown, to take measures and engage in conduct with a view of overthrowing and destroying and attempting to overthrow and destroy by force and show and threat of force the Government of the State of Pennsylvania and of the United States, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the inquest aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there individually and in connection and combination with another person and other persons whose name and names are to this Inquest unknown make and publish and distribute and cause to be made and published and distributed and have in his possession with intent to distribute and publish and for another purpose, a certain writing, publication, printing, cut and cartoon and did make certain utterances and was [fol. 10] guilty of conduct, the intent of which was and is to incite and encourage a person and persons whose name and names are to this Inquest unknown, to commit an overt act and overt acts with a view to bringing the Government of the State of Pennsylvania and the Government of the United States into hatred and contempt contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Inquest Aforesaid upon their oaths and solemn affirmations aforesaid do further present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there individually and in combination and connection with another person and other persons whose name and names are to this inquest unknown, make and publish and distribute and cause to be made and published and distributed, and have in his possession with intent to publish and distribute and for another purpose, a certain writing, publication, printing, cut and cartoon, and did make certain utterances and was guilty of conduct, the intent of which was and is to incite a person and persons whose name and names are to this Inquest unknown, to do personal injury and harm to an officer and officers of the State of Pennsylvania and to an officer and officers of the United States, the name of said officer and officers and the name and nature of their office and offices being to said Inquest unknown, and to damage and destroy public property and the property of public officials, because of their official position, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

[fol. 11] And the Inquest Aforesaid upon their oaths and solemn affirmations aforesaid Do Further Present: That the said Steve Nelson ~~otherwise called~~ Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did individually and in connection and combination with another person and persons whose name and names are to this Inquest unknown, make and publish and cause to be made and published and distribute and cause to be made and distributed and published and have in his possession with intent to publish and distribute and for another purpose a certain writing, publication, printing cut, cartoon and utterance, which advocates and teaches the duty, necessity and propriety of engaging in crime, violence and a certain form of terrorism

the particular description of which is to said Inquest unknown, as a means of accomplishing political reform and change in government, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

And the Inquest Aforesaid upon their oaths and solemn affirmations aforesaid Do Further Present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, unlawfully and feloniously did then and there in connection and combination with another person and other persons whose name and names are to this Inquest unknown, sell, give away, and distribute and cause to be sold and given away and distributed, and have in his possession for sale, gift, and distribution, certain prints, publications, books, papers, documents and written matter in another form, which advocates, furthers and teaches sedition, contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

[fol. 12] And the Inquest Aforesaid upon their oaths and solemn affirmations aforesaid Do Further Present: That the said Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischinger otherwise called "Hugo" otherwise called Steve Mesarosh on the day and year aforesaid, at the County aforesaid and within the jurisdiction of this Court, did then and there unlawfully, feloniously and wilfully sell, give away, have in his possession and distribute certain prints, publications, books, papers, documents and other written matter, to-wit:

The Communist Manifesto.
Foundations of Leninism.
State and Revolution.
The Communist Party in Action.
Stalin's Speeches.
History of the Communist Party of the Soviet Union.
The Twilight of World Capitalism.
Stalin Is Leading Us to the Victory of Communism.

The Dictatorship of the Proletariat which said prints, publications, books, papers, documents and printed matter advocated, furthered and taught sedition, in part in the Following Language, which said language refers to this Commonwealth and the United States:

"In depicting the most general phases of the development of the proletariat, we traced the more or less veiled civil war, raging within existing society, up to the point where that war breaks out into open revolution, and where the violent overthrow of the bourgeoisie lays the foundation for the sway of the proletariat.

"The immediate aim of the Communists is the same as that of all other proletarian parties: Formation of the proletariat into a class, overthrow of bourgeois supremacy, conquest of political power by the proletariat.

"In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of Private property.

[fol. 13] "The dictatorship of the proletariat cannot arise as the result of the peaceful development of bourgeois society and of bourgeois democracy; it can arise only as the result of the smashing of the bourgeois state machine, the bourgeois army, the bourgeois bureaucratic machine, the bourgeois police.

"The Society organization of the state alone is capable of immediately and effectively smashing and finally destroying the old, i.e., the bourgeois, bureaucratic and judicial apparatus.

"The bourgeois state can only be 'put an end to' by a revolution.

"The replacement of the bourgeois by the proletarian state is impossible without a violent revolution.

"The overthrow of the bourgeois rule can be accomplished only by the proletariat, as the particular class, which, by the economic conditions of its existence, is being prepared for this work; and is provided both with the opportunity and the power to perform it.

"You have joined the Communist Party of the United States of America because you have seen it in action as the revolutionary Party of the American proletariat.

"By joining the Party you have demonstrated your understanding that voting alone for the Communist program

and ticket in an election campaign is not sufficient, that only as a member of the Party, participating daily in the building up of the Party's strength and influence among the masses, also for the extra-parliamentary struggle, can you become fully effective in the fight for the overthrow of the dictatorship of the capitalist class, in the fight to establish the dictatorship of the proletariat in the United States.

"You have accepted the fundamental principle of Leninism that the proletariat must exercise the hegemony in the revolution against capitalism.—

[fol. 14] "The abolition of bourgeois individuality, bourgeois independence, and bourgeois freedom is undoubtedly aimed at.

"In a word, you reproach us with intending to do away with your property. Precisely so; that is just what we intend.

"The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital.

"The Communist revolution is the most radical rupture with traditional property relations; no wonder that its development involves the most radical rupture with traditional ideas.

"The proletariat will use its political supremacy to wrest, by degrees, all capital from the bourgeoisie, to centralise all instruments of production in the hands of the state, i.e., of the proletariat organised as the ruling class; and to increase the total of productive forces as rapidly as possible.

"Of course, in the beginning, this cannot be effected except by means of despotic inroads on the rights of property—

"In short, the Communists everywhere support every revolutionary movement against the existing social and political order of things. In all these movements they bring to the front, as the leading question in each case, the property question, no matter what its degree of development at the time.

"The Communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a Communist revolution.

"First dogma" concerning the conditions for the seizure of power by the proletariat. The opportunists assert that the proletariat cannot and ought not to take power unless it constitutes a majority in the country. No proofs are adduced, for there are no proofs, either theoretical or practical, that can justify this absurd thesis. Let us assume that this is so, Lenin replies to these gentlemen of the Second International; but suppose a historical situation has arisen [fol. 15] (a war, an agrarian crisis, etc.) in which the proletariat, constituting a minority of the population, has an opportunity to rally around itself the vast majority of the labouring masses; why should it not take power then?

"Does not the history of the revolutionary movement show that the parliamentary struggle is only a school for and an aid in organizing the extra-parliamentary struggle of the proletariat, that under capitalism the fundamental problems of the working class movement are solved by force, by the direct struggle of the proletarian masses, their general strike, their insurrection?

"—theory can become a tremendous force in the working class movement if it is built up in indissoluble connection with the revolutionary practice;

"Now we must speak of the world proletarian revolution; for the separate national fronts of capital have become links in a single chain called the world front of imperialism, which must be opposed by a common front of the revolutionary movement in all countries.

"Where will the revolution begin: Where, in what country, can the front of capital be pierced first?

"Where industry is more developed, where the proletariat constitutes the majority, where there is more culture, where there is more democracy—that was the reply usually given formerly.

"No, objects the Leninist theory of revolution; not necessarily where industry is more developed, and so forth. The front of capital will be pierced where the chain of imperialism is weakest, for the proletarian revolution is the result of the breaking of the chain of the world imperialist front at its weakest link;—

"Where will the chain break in the near future? Again, where it is weakest. It is not precluded that the chain may break, say, in India."

[fol. 16] "For this the victory of the revolution in at least several countries is needed. Therefore, the development and support of revolution in other countries is an essential task of the victorious revolution.""

"Lenin expressed this thought in a nutshell when he said that the task of the victorious revolution is to do 'the utmost possible in one country for the development, support and awakening of the revolution in all countries'.

" 'The fundamental question of revolution is the question of power.' (Lenin) Does this mean that all that is required is to assume power, to seize it? No, it does not mean that. The seizure of power is only the beginning. For many reasons the bourgeoisie that is overthrown in one country remains for a long time stronger than the proletariat which has overthrown it. Therefore, the whole point is to retain power, to consolidate it, to make it invincible. What is needed to attain this? To attain this it is necessary to carry out at least the three main tasks that confront the dictatorship of the proletariat 'one the morrow' of victory:

"(a) to break the resistance of the landlords and capitalists who have been overthrown and expropriated by the revolution to liquidate every attempt on their part to restore the power of capital:

"(b) to organize construction in such a way as to rally all the laboring people around the proletariat, and to carry on this work along the lines of preparing for the liquidation, the abolition of classes;

"(c) to arm the revolution, to organize the army of the revolution for the struggle against foreign enemies, for the struggle against imperialism.

"The dictatorship of the proletariat is needed to carry out, to fulfil these tasks.

[fol. 17] "By joining the Party you have signified your conviction that the interests of the working class dictate a revolutionary way out of the crisis. The program of the

Communist Party offers the road for the achievement of the revolutionary way out of the crisis.

"The Communist Party of the United States holds the view that only in the measure in which we become a Bolshevik Party do we fulfill our tasks as a Communist Party.

"Our Party is the United States Section of the Communist International which is a world Communist Party and each one of us is therefore a member of a world Party. In this lies the greatest hope and promise of success for the world's proletarian revolution and all oppressed and exploited in their struggle against capitalism.

"Strong with bolshevik self-criticism, boldly exposing, criticizing, and correcting the past and present errors, the American Party will follow the path of bolshevization enlightened by Stalin's speeches, and will be worthy of Stalin's definition of our Party as "one of the few Communist Parties in the world upon which history has laid tasks of a decisive character from the point of the world revolutionary movement."

"Marx and Engels taught that it was impossible to get rid of the power of capital and to convert capitalist property into public property by peaceful means, and that the working class could achieve this only by revolutionary violence against the bourgeoisie, by a Proletarian Revolution, by establishing its own political rule—the dictatorship of the proletariat—which must crush the resistance of the exploiters and create a new, classless, Communist society.

"Hence the transition from capitalism to Socialism and the liberation of the working class from the yoke of capitalism cannot be effected by slow changes, by reforms, but only by a qualitative change of the capitalist system, by revolution.

"American capitalism is like a sort of monster parasite living on the body of the rest of world capitalism; [fol. 18] it is cannibalistically devouring the other capitalist countries and growing fat upon their life substance.

"American imperialism is like a monstrous, all-consuming spider. It has sucked up most of the available gold supplies of the capitalist world and hoarded them away at Fort Knox; it has made nearly every capitalist nation

in the world its debtor; it is stripping the various capitalist nations of their foreign markets, of their economic strength, and of their national independence. It has set up a more or less definite political control over all the important capitalist countries in the world. Now it is stretching out its claws for the U. S. S. R., the European new democracies, and the colonial and semi-colonial countries, in the hope that it can overwhelm them and devour them at its leisure. This is the parasitic, cannibalistic role of American capitalism in the world today.

"Under the leadership of the great Stalin, forward to the victory of Communism.

"The proletarian revolution is impossible without the forcible destruction of the bourgeois state machine and the substitution for it of a New One."

Contrary to the form of the Act of the General Assembly in such case made and provided and against the peace and dignity of the Commonwealth of Pennsylvania.

TEST. PRO RESPUB.

M. A. Musmanno, Matt Cvetic, Joseph Becker, George Marshall, Harry Alan Sherman; J. Davidson.

(Signed) William S. Rahauser, District Attorney for Allegheny County.

Sworn by me, (signed) Elsie Muse, Sr. Foreman.

And now May 22-1951 a Juror withdrawn and case continued as to the above Defendant.

By the Court, (Signed) O'Brien, J.

[fol. 15] October Sessions, 1950

No. 764

Commonwealth

vs.

Steve Nelson Alias Louis Evans Alias Joseph Fleischinger Alias "Hugo" Alias Steve Mesarosh

Indictment: Sedition

Prosecutor M. A. Musmanno, Oct. 17, 1950. True Bill.
(Signed) Elsie Muse, Sr. 1950, Foreman.

The Defendant Jan. 12, 1951 pleads non cul-et de hoc, District Attorney Similiter. Issued joined.

Dec. 18, 1951, In Open Court Defendant pleads *Not Guilty*. Issue joined by District Attorney
Jan. 31 1952
Guilty—See Verdict Filed on Counts 1-2-3-4-5-6-7-8-9-10-11-12

Defendant present in Open Court when verdict(s) recorded.

(Signed) H. M. Montgomery, Trial Judge.

And now June 26th, 1952, Defendant present in Open Court for sentence. Barney Phillips apointed Counsel to represent him defendant consenting thereto, on motion of Counsel for defendant at request of defendant sentence postponed until Thursday July 10th 1952, bond ordered cancelled and defendant committed to jail to await further disposition.

By the Court, (Signed) H. M., J.

July 10 1952 Defendant sentenced to pay a fine of $10,000 to the Commonwealth. Pay costs of prosecution and undergo an imprisonment of 20 years in Allegheny County Work House and stand committed. Date of last Commitment June 26, 1952.

By the Court, (Signed) H. M., J.

Fagan, Minute Clerk.

And now Sept. 3rd, 1952, It is hereby ordered and directed that, the defendant Steve Nelson be released from Ally. County Jail in custody of the Sheriff and to be committed to the Ally. County Work House to serve the sentence imposed at #764 Oct. Sess. 1950 on July 10th, 1952.

By the Court: (Signed) H. M., J.

[fol. 20] In the Court of Quarter Sessions for County of Alleghény, Oct. Sessions, 1950

No. 764

[Title omitted]

Prosecutor: M. A. Musmanno.
Charge: Sedition.

Verdict—January 30, 1952

And now, to wit: Jan. 30, 1952, we the Jurors empanelled in the above entitled case, find the defendant Guilty.

1 Guilty	6 Guilty	12 Guilty
2 Guilty	7 Guilty	
3 Guilty	8 Guilty	
4 Guilty	9 Guilty	
5 Guilty	11 Guilty	

(Sgd.) Mrs. Alice M. Cookman, Foreman.

And now Jan. 31, 1952, the jury having been polled at the request of defendant and all jurors affirming the verdict of guilty on all counts and the verdict having been recorded as guilty on all counts; the verdict is hereby moulded to include a finding of guilty on count 10 as well as all others same being inadvertently omitted.

By the Court: (Signed) H. M. Montgomery, J.

[fol. 21] IN THE COURT OF QUARTER SESSIONS OF THE PEACE AND GENERAL JAIL DELIVERY

in and for the

COUNTY OF ALLEGHENY, PENNSYLVANIA

No. 764 Oct. Sessions, 1950

[Title omitted]

Charge: Sedition

Prosecutor: M. A. Musmanno

VERDICT ON FIRST TRIAL—May 22, 1951

And now, to wit: — 19 — , the Jurors empannelled in the above entitled case, find the defendant —

And now May 22, 1951, a Juror withdrawn and case continued as to Steve Nelson otherwise called Louis Evans otherwise called Joseph Fleischniger otherwise called Hugo, otherwise called Steve Mesarosh.

By the Court, (Signed) O'Brien, J.

[fol. 22] IN THE COURT OF QUARTER SESSIONS OF ALLEGHENY COUNTY, PENNSYLVANIA

[Title omitted]

DEFENDANT'S MOTIONS

1. I move that the indictment against me be quashed and the case dismissed because the law on which the indictment is based is unconstitutional and it violates and deprives me of my rights under the State and Federal constitutions.

2. I move that the indictment against me be quashed and the case dismissed because the indictment does not state a crime against me.

3. I move that the indictment against me be quashed and the case dismissed because the Commonwealth has not proved a case against me.

(Signed) Steve Nelson.

[fol. 23] In the Court of Quarter Sessions of Allegheny County

[Title omitted]

Motion to Quash Indictment—Filed December 22, 1950

Defendant by his attorney respectfully moves the Court to quash the indictment in the above case and assigns therefor the following grounds and reasons:

1. The Act of Assembly, 1939 P.L. 872, sec. 207, under which the indictment is brought, is unconstitutional and invalid for the following reasons:

a. It is repugnant to Article I, Sec. 2 of the Constitution of Pennsylvania which provides: "For the advancement of these ends they have at all times an inalienable and indefeasible right to alter, reform or abolish their government in such manner as they may think proper."

b. It is repugnant to Article I, sec. 7 of the said Constitution guaranteeing to all persons the freedom of the press.

c. It is repugnant to Article I, sec. 20 of the said Constitution guaranteeing to all persons freedom of assembly.

d. It is so broad and sweeping in its provisions and so vague, indefinite and uncertain in its language that it fails to give to any reasonable person knowledge or notice of what acts or conduct is thereby made unlawful.

e. It makes unlawful membership in a group whose policies allegedly are seditious, whether such membership is with conscious knowledge of the "unlawful" policies.

f. It offends against Art. I, sec. 10 of the said Constitution which protects the citizen from being placed twice in jeopardy for the same acts, said act of assembly declaring certain conduct towards the government of the United States to be a crime against the Commonwealth of Pennsylvania, which conduct may also be a crime against the United States, thus creating double jeopardy.

[fol. 24] g. It offends against Art. I, sec. 26 of the said Constitution which protects the rights of the citizen from infringement by government.

h. It offends against the 14th Amendment of the Constitution of the United States in that it deprives citizens of

their rights, liberties and property without due process of law, and seeks to punish defendant for the exercise of his freedom of speech, press and assembly.

i. It has been impliedly superceded by the enactment by the Congress of the United States of the Internal Security Act of 1950 and the Sedition Act of June 25, 1948, 18 U.S.C.A. 2384-5-6, which completely cover this field of legislation.

2. The indictment is unlawfully discriminatory and arbitrarily and intentionally unfair in the following respects:

a. Defendant is charged with possession and distribution of books and pamphlets which is possessed and distributed by bookstores, libraries and colleges which are obviously not subject to be prosecuted under the statute.

b. Defendant allegedly as an official and member of the Communist Party is charged with encouraging others to do acts which may bring the government into hatred and contempt, whereas other members of other political parties who bring the government into hatred and contempt are not prosecuted under the statute.

c. The indictment is brought as the result of the unlawful entrapment and entrapment of the defendant by the prosecutor, Judge M. A. Musmanno, a judge of this Court, who in purchasing the alleged seditious documents, caused any alleged illegal acts to be committed.

d. The indictment is brought as the result of the unlawful wholesale denial of the civil rights of the defendant by the prosecutor, Judge M. A. Musmanno, a judge of this court, with the aid and approval of the District Attorney and other persons, in knowingly and deliberately creating public hysteria against defendant through inflammatory newspaper interviews, public speeches, radio addresses, etc.; in illegally causing the offices of the defendant to be [fol. 25] padlocked; in committing the defendant to jail without bail and in illegally setting excessive bail for defendant and illegally imposing conditions upon which he might continue to be on bail; in causing an illegal seizure and forfeiture of the property of the defendant to be paid; and other acts of a similar nature.

e. The indictment and the proceedings thereon were irregular and not according to law in that no fair and regu-

lar preliminary hearing was held; that by reason of the fact that the prosecutor was then and there a judge of this court, that he interrogated witnesses and acted not only as private prosecutor but as a prosecuting attorney and witness.

f. The indictment is brought as the result of the undue influence and prestige of the prosecutor, a judge of this Court and well known to the members of the Grand Jury as such.

g. The indictment was brought by the prosecutor in bad faith acting for the purpose of securing favorable newspaper and radio publicity to aid him in his unsuccessful campaign to be elected to the office of Lieutenant Governor of this Commonwealth on November 7 last.

3. The indictment is repetitious and replete with duplicity and re-avers in many alternative words and phrasings the same alleged illegal "conduct."

4. The indictment fails to set forth the commission of any illegal acts. It merely repeats the words of the statute, amounting to a bare recital that the defendant has violated the sedition act but fails to allege any acts or conduct which constitute such a violation.

5. The indictment is defective in that insertions and interlineations have been made therein of "and on divers days and times prior thereto," which is a material and fatal alteration of the indictment handed down by the Grand Jury.

6. The proceeding violates the guarantee to defendant of due process and violates Article I, Sec. 9 of the Constitution of Pennsylvania which provides: "In all criminal prosecutions the accused hath a right . . . to demand the nature [fols. 26-27] and cause of the accusation against him" in that the defendant has not been served with notice that an indictment was returned, has not been served with a copy of the indictment, and has not been given any particulars of the accusation against him.

7. The following quotations set forth in the indictment are irrelevant to the charge and are not within the purview of the statute and should be stricken from the indictments:

> "The bourgeois family will vanish as a matter of course when its complement vanishes, and both will vanish with the vanishing of capital.

"American capitalism is like a sort of monster parasite, living on the body of the rest of world capitalism; it is cannibalistically devouring the other capitalist countries and growing fat upon their life substance.

"American imperialism is like a monstrous, all consuming spider. It has sucked up most of the available gold supplies of the capitalist world and hoarded them away at Fort Knox; it has made nearly every capitalist nation in the world its debtor; it is stripping the various capitalist nations of their foreign markets, their economic strength and their national independence. It has set up a more or less definite political control over all the important capitalist countries in the world. Now it is stretching out its claws for the USSR, the European new democracies, and the colonial and semi-colonial countries, in the hope that it can overwhelm them and devour them at its leisure. This is the parasitic, cannibalistic role of American capitalism in the world today."

8. The indictment is defective in that it does not appear that the alleged seditious matter was directed at or towards the "government of this state or of the United States" or "against the state or against the United States" or "any officer of this state or of the United States" or "public property or the property of any public official."

9. The indictment is prejudicial to the defendant in that it sets forth a number of "aliases" of the defendant, not for the purpose of identifying the defendant whose identity is not in question, but solely for the purpose of creating animosity, prejudice and hostility to the defendant in the minds of the jury. Said aliases should be stricken from the indictment.

(Signed) Sylvia Schlesinger, Hymen Schlesinger, N. D. Davis, Attorneys for Defendant.

[fols. 28-48] In the Court of Quarter Sessions of the Peace of Allegheny County

[Title omitted]

Order of Court Dismissing Motion to Quash—Dec. 26, 1950

And now, to wit, this 26th day of December, A. D. 1950 after argument and upon consideration thereof, it is hereby ordered that the motion to quash the indictment be and the same is hereby dismissed.

The Court, By (Signed) Ellenbogen, J., Nixon, J. Eo die, exception noted to defendant and bill sealed.

(Signed) Ellenbogen, J., Nixon, J.

[fol. 49] In the Court of Quarter Sessions of Allegheny County

October Sessions 1950

No. 764

Commonwealth of Pennsylvania

vs.

Steve Nelson alias Louis Evans alias Joseph Fleischinger alias "Hugo" alias Steve Mesarosh

Before: Bauer, Adams and Montgomery, JJ.

Opinion Denying Motions for New Trial and in Arrest of Judgment—June 26, 1952

Montgomery, J.

Following his conviction on January 30, 1952 for violating the Sedition Law of this State, as presently stated in Section 207 of the Penal Code, adopted June 24, 1939, P. L. 872 (18 P. S. 4207), the defendant filed motions for a new trial and in arrest of Judgment which are now before us for disposition.

I. This court has jurisdiction

One of the reasons asserted in support of the motions is, that this court is without jurisdiction because the Federal Government has preempted this field of jurisdiction and therefore has exclusive jurisdiction. This reason is untenable. There is no question that where jurisdiction is exclusive in the Federal Government or where its jurisdiction is supreme in a field where the states may act in the absence of Federal legislation, the state may not interfere by legislation it may pass: Hines v. Davidowitz, 312 U. S. 52, in which case it was held that the registration of aliens is within such fields. The Alien Registration Act of 1940, [fol. 50] June 28, C 439-54 Stat. 670, therefore, supersedes the Pennsylvania Act of 1939, P. L. 74. The reason for this is that nationals of other countries everywhere as well as our citizens abroad are protected by treaties which are in the exclusive hands of the Federal Government under our Constitution. However, since the defendant is a naturalized citizen of this country, the matter of treaty is not involved; and further, lack of citizenship is no defense in prosecutions under state criminal laws. Therefore, the Alien Registration Act does not supersede the legislation under which defendant was prosecuted.

Defendant argues further that the Smith Act and the McCarran or Internal Security Act together preempted this same field and therefore precluded the Commonwealth of Pennsylvania from acting.[1] These Acts are very broad and include the protection of the national as well as the state government from the ravages of Communism. However, that alone does not nullify the state legislation. As we have just stated, that nullification comes about only when the Federal Government's jurisdiction is exclusive or when it is supreme, and in the latter case the Federal Government must expressly or by necessary implication in-

[1] The Smith Act of June 25, 1948, C 645-62 Stat. 808, 18 U. S. C. 2384-2385, being a restatement with amendment of the Act of June 28, 1940, C 439 (18 U. S. C. 1950 Ed.) (10, 11, 13) and the Act of March 4, 1909, Sect. 6, (18 U. S. C. 1940 Ed.) (6) and the McCarran or Internal Security Act of Sept. 23, 1950, C 1024, Title I (50 U. S. C. 78) (et seq).

dicate its intention of superseding or precluding the action of the state; 22 C. J. Sec. 16 (p. 65). We find nothing in the Smith Act or the McCarran Act, expressly precluding [fol. 51] the states from acting and we do not read in the Acts any necessary implication to that effect. On the contrary, the latter Act expressly provides (Sect. 17, 50 U.S.C.A. 796) the following:

> "The foregoing provisions of this sub-chapter shall be construed as being in addition to and not in modification of existing criminal statutes."

We are of the opinion that the legislation upon which this prosecution is based comes under the head of "concurrent jurisdiction" as described in U. S. v. Lanza, 260 U. S. 377, wherein the Court said:

> "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. Each may, without interference by the other, enact laws to secure prohibition, with the limitation that no legislation can give validity to acts prohibited by the amendment. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other."

Also, Westfall v. U. S., 274 U. S. 256, wherein the Court said:

> "Of course an act may be criminal under the laws of both jurisdictions."

In Commonwealth v. Blankenstein, 81 Pa. Superior Ct. 340, our Superior Court, in speaking of the Pennsylvania Sedition Act, said:

> "No one, whether as an alien or citizen, has any warrant in the Constitution to overthrow its authority by violence and the right to counteract violences includes the power to prohibit conduct the purpose of which is to produce public disorder and antagonism against the state."

This same right is recognized by our laws even when applied to the individual citizen. His right of self defense justifies homicide; likewise, the state need not depend upon the vigilance and action of the Federal authorities and thereby risk its own existence. The right of the state to [fol. 52] exercise its police power to protect itself is as important to it as the same attribute of the Federal Government and in the absence of any delegation of that right by the state to the Federal Government it would still remain with it under the Tenth Amendment to the U. S. Constitution.[2] We find nothing in our Constitutions that would indicate an intention of depriving the Commonwealth of Pennsylvania of that right or the transferring of it to the Federal Government unless it be Article I, Sect. 8, Clause 15 of the United States Constitution which delegates to Congress the right "to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasion." In our opinion, this provision does not lend itself to an interpretation that the state is deprived of the right to make criminal acts that could and are intended to cause public disorder even though such acts might eventually lead to insurrection. Sect. 102, Title II of the McCarran Act also supports this position because it is therein provided that the declaration by the President of 'internal security emergencies' is contingent upon the happenings of those things mentioned in the foregoing Constitutional provision, to-wit: "invasion and insurrection and declaration of war."[3]

---

[2] The powers not delegated to the U. S. by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

[3] "Tit. 50, U. S. C. A. 812. Declaration of 'internal security emergency' by President; events warranting, period of existence (a) In the event of any one of the following:

(1) Invasion of the territory of the United States or its possessions,

(2) Declaration of war by Congress, or

(3) Insurrection within the United States in aid of a foreign enemy,

and if, upon the occurrence of one or more of the above,

[fol. 53] The police power is the greatest and most important attribute of government; on it the very existence of the state depends. If the exercise of the police power should be in irreconcilable opposition to a constitutional provision or right the police power would prevail. See Commonwealth v. Widowich et al., 93 Pa. Superior Ct. 323 and 295 Pa. 311, (318), and cases therein cited. The importance of the matter dictates that jurisdiction be concurrent so that every means of protection is available.

In this connection, we are of the further opinion that the acts of defendant within the Commonwealth of Pennsylvania were not such as to be:

> "* * * interwoven with contemporary national policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government * * *."

Nor do we place any merit upon the further argument that the federal field has been invaded because certain U. S. S. R. information bulletins presented in evidence, were published by the Embassy of the Union of Soviet Socialist Republics and circulated under an agreement between the Soviet Union and the United States. These pamphlets did not form the basis for the prosecution; they were incidental thereto and were offered merely to throw light on the defendant's intentions in his use of other literature upon which the indictment depended. He was not prosecuted for

> the President shall find that the proclamation of an emergency pursuant to this section is essential to the preservation, protection and defense of the Constitution, and to the common defense and safety of the territory and people of the United States, the President is authorized to make public proclamation of the existence of an 'Internal Security Emergency.'
>
> "(b) A state of 'Internal Security Emergency' (hereinafter referred to as the 'emergency') so declared shall continue in existence until terminated by proclamation of the President or by concurrent resolution of the Congress. Sept. 23, 1950, c. 1024, Title II, Sect. 102, 64 Stat. 1021."

circulating these bulletins and there was therefore no violation of the agreement between the two governments; or the invasion of any field in which the jurisdiction of the national government was exclusive or supreme.

[fol. 54] II. The Sedition Act Is Constitutional

We are next asked to rule upon the constitutionality of the Act involved and to ignore the decisions of our Appellate Courts particularly Commonwealth v. Widowich, 93 Pa. Superior Ct. 323, reviewed by the Supreme Court at 295 Pa. 311; Commonwealth v. Lazar, 103 Pa. Superior Ct. 417; Commonwealth v. Blankenstein (supra) and others. The answer to this argument is found and clearly stated in the case of Townsend Trust Co., 349 Pa. 62:

> ". . . a lower court has no right to ignore the latest decision of the Superior Court of this Commonwealth on an issue which has been squarely decided. Until that decision should be overruled by the Supreme Court, it is still the law of the Commonwealth, regardless of the decisions of any other court in the country, including the Federal Court."

This rule is also supported by Statute, in Act of 1895, June 24, P.L. 212 (Sect. 10); 17 P.S. 198, and is applicable to constitutional questions: Gerlach v. Moore, 243 Pa. 603; and Keator v. Lackawanna County, 292 Pa. 269. It is only inapplicable when other statutes have been the subject of consideration; Commonwealth ex rel Margiotti v. Lawrence et al., 326 Pa. 526; Heisler v. Thomas Colliery Co., 274 Pa. 448.

In the absence of any decision of our Pennsylvania Appellate courts contrary to or in modification of the Widowich (supra) and Lazar, et al (supra) cases, we must, therefore, accept them as establishing the constitutionality of the Act now before us.

However, defendant argues that since Par. (c) of the Act was excepted from the discussion in the Widowich case (no charge having been laid thereunder in that indictment) there is no precedent established by an Appellate Court [fol. 55] that is binding; and therefore we should pass on

the constitutionality of that particular paragraph si
certain counts of the present indictment (2, 3, 4 and 8)
based upon it. In support of the argument a portion of
charge to the jury by O'Brien, J. in the trial of Onda,
Dolsen under this present indictment is offered. The s
stance of the offered matter is that Sect. (e) does not cha
a crime and is in violation of the Constitution of the Uni
States.

At the outset, it can be said that the charge of a t
judge to the jury in any case is not a decision. It can a
be further said that decisions of courts of equal jurisd
tion are persuasive and not binding: Geyer v. Phila.
Pass. R. Co., 17 Phila. 86.

However, since we are now asked to pass on the con
tutionality of Sect. (e) and no statements of our Appell
Court have been presented to us, we shall do so.

The draftors of our Sedition Act drew fine distinctio
in the ways the crime could be accomplished. The accus
by the use of words, writing or conduct must intend to:

(a) Cause an outbreak or demonstration of viole
against government.

(b) To encourage others to do so.

(c) To incite and encourage others *to commit a*
with the view of bringing government into hatred a
contempt.

(d) To incite and encourage others to do injury
public officers or damage public property.

The element not expressly stated in (c) that is present
the other three is the accomplishment of actual overthr
or harm to government, or injuries to public persons
damage to public property. We fail to see how this disti
tion brings such acts within the protection of the consti
tional provision assuring freedom of speech, press or
sembly. Just as surely as harm to government is intend
in (a), (b) and (d), it is intended and anticipated in (
[fol. 56] To subject a person or a government to the hatr
and contempt of his neighbors or its governed is to inv
an attack upon him or it. The venom attached to su
emotions leads to the violence and show of force that t
Statute intends to prevent and the thing against which g

ernment may and must defend itself before it occurs. There can be no question that their effect would be to undermine the stability of government and lead to its overthrow by force. We, therefore, hold that such a provision, par. (c), does state a crime and is a constitutional enactment for the same reasons as stated in the Lazar and Widowich cases (supra). To bring government into hatred and contempt or to incite others to commit overt acts is to abuse the privileges of criticizing and advocating changes which are protected by our constitution.

The Trial Judge did not rewrite the Statute, or disregard the Widowich and Lazar cases in requiring a presently or proximate operative intent to be found by the jury to sustain a conviction. The Lazar case stated that:

> ". . . whether the appellant was dealing in the present or future is immaterial . . ." (p. 421)

The Trial Judge by charging that:

> "However, you must find the results intended were for the present or in the future as same or as speedily as circumstances should permit; not at some uncertain time in the distant future."

merely limited the matter to a definite basis rather than some theoretical or speculative sphere. This was beneficial to the defendant, not prejudicial.

[fol. 57] III: The Indictment Meets Constitutional Requirement

In addition to the objection made to the constitutionality of the Act, defendant makes additional objections to the indictment, asserted as constitutional objections based on the failure to sufficiently state the crime or crimes described by the Statute.

Counts six to twelve are first referred to in defendant's brief and the objection is that "possession" of literature is the offense charged, whereas "advocacy" is the crime the Statute forbids. However, an examination of these counts reveals that "possession" is only one part of the charge, "sale, distribution, etc.," being also alleged. There are, therefore, sufficient allegations in these counts to de-

scribe the crimes of the statute. However, we are not inclined to the ruling that possession is not part of the crime; in the Widowich case the indictment contained the same allegation including "possession" (see 93 Pa. Superior Ct. at 327).

Insofar as specific intent is concerned, the indictment is adequate and was more informative than the indictments in Commonwealth v. Bevelecky, 79 Pa. Superior Ct. 12 and other cases hereinbefore mentioned. It meets the requirements of the Constitution that it furnish sufficient information to enable defendant to properly prepare his defense and it is sufficiently precise to protect him from a second prosecution for the offenses charged.

In this connection, defendant objects to the indictment for the further reason that an amendment was allowed changing the date from July 19, 1950 "and on diverse times before and since that date" to August 31, 1950 "and on diverse times before and since that date". Amendments of dates to conform to the evidence are permissible under Sect. 11, [fol. 58] Act 1860, March 31, P.L. 427 (19 P.S. 431) when the date is not of the essence; Commonwealth ex rel Bandi v. Ashe, 367 Pa. 234. The amendment was made to include the last date on which the defendant was associated with the literature, bookstore, etc., as shown by the evidence. It did not set up a separate crime or one not considered by the Grand Jury on October 17, 1950 when that body acted; and, therefore, the amendment violated no constitutional rights defendant may have. There is nothing in the record to indicate any surprise on the part of defendant. The indictment both before and after the amendment gave notice to defendant that subsequent as well as prior events within the period of the indictment confronted him.

[fol. 59] IV. The Evidence Supports the Verdict

There is substantial evidence to establish the following facts:

For some time prior to August, 1948 and continuously thereafter until August 31, 1950 (when its office was padlocked and the contents seized) the Communist Party, U. S. A. maintained offices and a bookstore in the Bakewell Building on Grant Street in the City of Pittsburgh; the

Communist Party U. S. A. is not a legal political party but is part of or affiliated with the Communist International of the Soviet Union and its aims and purposes are to accomplish the overthrow of the Government of the United States and its constituent governments including that of the Commonwealth of Pennsylvania by force and violence; defendant has been for many years a member of the Communist Party, U. S. A.; in August of 1948 he arrived in Pittsburgh and assumed the position and duties of paid district organizer and chairman of the Communist Party of Western Pennsylvania; and as such maintained his office in the Bakewell Building headquarters; he proceeded to organize the party in Western Pennsylvania; his authority was complete and covered recruiting drives for members, educational discussions, infiltration into industry, fraternal and educational, religious and other groups, sale and distribution of literature of the Communist Press and the Daily Worker and the works of Marx and Engels, Lenin, Stalin and other Russian writers; the conduct and reports of meetings, preparation of budgets, the collection of contributions and the operation of the headquarters; the books and other articles sold and otherwise disseminated from the headquartgrs, under the defendant's control and supervision were such as to be seditions in themselves or were such as could be used for purposes described by the Pennsylvania Sedition Act of — seditious; the defendant intended that the dissemination of the books and other literature should accomplish those [fol. 60] results which the Sedition Act sought to prevent; large quantities of such material as well as maps of Russia, pictures of Russian officers were found publicly displayed and seized in the headquarters of defendant when it was searched under authority of a Search Warrant on August 31, 1950; defendant's activities, supervision and authority, as aforesaid, was exercised by him continuously from August, 1948 until August 31, 1950, and during said period there was sold and otherwise disseminated from said headquarters the books and literature aforementioned.

Such a set of facts is similar to those found in the Widowich case in which much of the same literature as concerns us formed the basis for the indictment; and the activities of the defendants therein during the two year period before the indictment was drawn were comparable to the

actions of the present defendant. Here, he was a member chairman and district organizer; there, they were active members and leaders and at times served as secretary, all the while distributing the books and pamphlets aforementioned, including the Daily Worker. The present defendant's motives and intention to accomplish sedition is supported by adequate evidence relating to his actions before the period of the indictment as well as during it; likewise, as to the purposes of the Communist Party, U. S. A. and the Pittsburgh group affiliated with it.

Defendant argues that since there is no evidence that places him in the headquarters on July 19, 1950, the original date set forth in the indictment or on August 31, 1950, the date established by the amendment; and further since there is no evidence that he committed any acts forbidden by the Statute on any other specific day within two years of the founding of the indictment, viz., within the two-year period immediately prior to October 17, 1950, his conviction cannot stand. In this connection, his counsel relies strongly on the [fol. 61] case of Commonwealth v. Dingman, 26 Pa. Superior Ct. 615. However, our analysis of that case supports rather than unsettles the verdict.

The defendant in the Dingman case was charged with larceny of oil which he extracted from the owners' pipelines by means of a T connection he had made, controlled by a valve which diverted the oil from the owners' lines into that of the defendant. The device was discovered and by certain tests it was determined that after the device was removed the flow of oil into the owners' lines increased 11.10 barrels per day. The defendant was not present but was later arrested and charged with stealing 2000 barrels of oil "on the 7th day of November, 1903", which was the day of discovery. In sustaining the verdict, the Court said:

> "There is authority for holding that the construction of the device with the intention of using it for the purpose of a continuous apparent increase in the production of the wells, and the various takings of oil, as opportunity offered, in pursuance of such intention, are all to be considered as one transaction and a continuing offense: Regina v. Bleasdale, 2 C. & K. 765; The Queen v. Firth, L. R. 1 C. C. 172; 11 Cox C. C. 234. If this case

be so regarded, then it was competent for the commonwealth to prove all that the defendant had done during the months that his device was in operation as a part of the offense which which he was charged. Even, however, if the appellant was guilty of a complete and distinct offense every time he placed his temporary pipe in position and turned the cock which permitted the oil to flow from the lines of the company, the evidence to which the defendant objected was competent upon the trial of this indictment."

Applying the analysis to the present case, it can readily be stated that the defendant had adapted a means, to wit, the headquarters and bookstore and the organization he had developed through which there was disseminated matorial that could and was intended to accomplish sedition as described by the Act; or as stated by the Act—defendant by "conduct individually or in connection or combination with any other person" (namely Dolsen, Onda and others who worked therein) committed the forbidden acts. As in [fol. 62] the Dingman case, he was not present at the particular time alleged in the indictment but his would not be fatal since the agency or means he utilized was in operation at the time alleged; and there is sufficient evidence to prove it was in operation both on July 19 and August 31, 1950 and continuously for at least two years before those dates. Therefore, the defendant could be convicted as committing a continuing crime or a separate one on August 31, 1950 as specified in the indictment. See Commonwealth v. Heller, 80 Pa. Superior Ct. 366 for another example of a continuing offense. Dennis v. U. S., 341 U. S. 494 (71 S. Ct. 857), also covered an extended period.

Defendant argues further that other essentials of the crime have not been established, viz.:

(1) Specific intent to accomplish the evil.

(2) A presently operative intent or "as soon as circumstances will permit".

(3) Clear and present danger.

(4) The Act must be one not protected by the first amendment.

Answering this argument seriatum it can be said that intent may be inferred as well as expressed (Widowich case, 295 Pa. 311 (p. 319)) and in some of the offenses the intent was declared by the Legislature by the doing of things regardless of the actor's actual intention Sections (e), (f) and (g). In those instances where it is required to be proved, there is ample evidence describing defendant's previous acts and declarations and also his position, purposes and acts during the indictment period to justify a finding of specific seditious intention.

We have previously discussed the matter of "presently operative" intentions and shall not repeat our discussion. [fol. 63] The question of "clear and present danger" was answered by the court as a matter of law in similar fashion, upon similar evidence and for similar reasons as present in the case of Dennis v. United States (supra). The question is further answered by the Lazar case, which holds similar evidence sufficient to sustain a conviction.

Lastly, the first amendment does not protect such acts (Widowich) (Lazar) (Blankenstein) supra.

We shall not review the evidence further. Much of defendant's brief is devoted to criticizing witnesses and attacking their credibility, and to the weight of the evidence. Such matters were for the jury. Likewise, with the interpretations to be placed on the literature offered in evidence. The same literature has been found in other cases to be seditious or such as to be used to accomplish sedition and to repeat the discussions of those other cases would add nothing. In the present case, the literature referred to in the indictment was explained and interpreted by learned witnesses familiar with it representing both viewpoints. The jury had the benefit of their opinions as well as the opportunity to examine the literature. They found it such as to form the basis of a conviction on all counts. We see no reason now why we should review it in order to rule that defendant's interpretation is correct and that it cannot form the basis for conviction because it is historical or otherwise and not seditious or an instrument through which sedition could be accomplished by a person so intending.

However, the conviction under Sect. (h) of the Statute relating to membership in the organization having seditious

policies or purposes requires some consideration. The Statute provides:

[fol. 64] "The word 'sedition,' as used in this section, shall remain:

. . . . . .

"(h) Organizing or helping to organize or becoming a member of any assembly, society, or group, where any of the policies or purposes thereof are seditious as hereinbefore defined."

It is recognized that defendant's membership in the Communist Party, U. S. A. ante dated the period of the indictment.[4] It must also be recognized that in view of our prior discussion, the Communist Party, U. S. A. was an organization having seditious policies and purposes. The evidence also establishes that the defendant was in Allegheny County to organize the branch of the Communist Party in Western Pennsylvania. Defendant, regardless, argues that this provision (h) must be limited to formulating or creating the Communist Party, U. S. A. initially which was done elsewhere and beyond the period of the indictment. We do not agree.

It is noted that the provision includes 'assembly, society, or group. This is broad enough to include the Pittsburgh office and bookstore and the group surrounding the defendant here, including the branch in Western Pennsylvania; and is not confined to the international or national unit of the Communist Party. Defendant was the executive head of the group in Pittsburgh which included himself, Dolsen, Onda, Carrothers, and others. That group was being constantly organized and enlarged under his leadership; and was operating on July 19, 1950 and August 31, 1950 as well as during the other days of the indictment period. The evidence is sufficient to show its motives and purposes were similar to the Communist Party of the U. S. A. Defendant's main purpose in Pittsburgh was to organize and this was a constant activity and not a completed act at any particu-

[4] See cases cited in Milasinovich v. The Serbian Progressive Club, Inc., 369 Pa. 26 (p. 29).

[fol. 65] lar time. We, therefore, hold that the provisions of Section (h) were violated.

V. The Defendant Was Not Deprived of His Right to Counsel Guaranteed by the Fourteenth Amendment to the Federal Constitution

The history of this case is the answer to this argument. The defendant from the beginning had counsel when he desired it, and when he lacked counsel, it was likewise his desire, although he had made great pretense that this is not so. An examination of the papers on file discloses representation as follows:

Date	Description	Appearance
Sept. 8, 1950	Petition for Writ of Habeas Corpus	Hymen Schlesinger
Dec. 22, 1950	Petition to quash indictment	Hymen Schlesinger, Sylvia Schlesinger N. D. Davis
Dec. 28, 1950	Petition to travel to New York to consult with his superiors in the Communist Party—to consult with consul there in preparation for hearing before Congressional Committee—and to Butler, Pa., to consult with Hymen Schlesinger for pre-trial proceedings in preparation for this trial set for Jan. 3, 1951	Hymen Schlesinger Sylvia Schlesinger
Jan. 2, 1951	Motion for Bill of Particulars	Hymen Schlesinger John T. McTernan
Sept. 6, 1951	Service of Petition of District Attorney to cancel bond	Accepted by H. Schlesinger with note "Steve Nelson is acting as his own attorney in this case."

Date	Description	Appearance
Sept. 10, 1951	Order to permit defendant to travel made on information received from attorneys McTernan and Pollitt	No appearance
Sept. 10, 1951	Motion to dismiss petition to cancel bond and answer	Hymen Schlesinger P. h. v.
[fol. 66]		
Sept. 27, 1951	Petition for continuance of trial date	Louis F. McCabe, Philadelphia, Pa.
Sept. 28, 1951	Motion for physical examination	Hymen Schlesinger P. h. v.
Oct. 8, 1951	Petition to travel to consult with Atty. Darlington Hoopes in Reading, Pa. thence to Wilkes-Barre—Scranton—Philadelphia and New York	No appearance
Nov. 20, 1951	Motion to travel to New York and Philadelphia to interview lawyers	No appearance
April 14, 1952.	Oral argument and brief in support of motion for new trial and in arrest of judgment	Basil R. Pollitt, New York City, N. Y.

In addition: (1) Defendant's previous trial started with John T. McTernan, Esq., and Hymen Schlesinger, Esq., as his attorneys. He then declined their services and proceeded alone; (2) In his petition to the Supreme Court for Writ of Prohibition, he recited that he had interested Howard Meldahl of Charleston, West Virginia, and Louis Fleischer and Aubrey Grossman of New York. Mr. Meldahl appeared before the Trial Judge early in December before the date on which the case was listed for trial and advised him that he was undertaking to represent Nelson but had an important case in West Virginia that was to commence December 17, 1951 and would last a week. Mr. Meldahl was told it would be possible to accommodate him.

However, he did not appear again and the only further information concerning him came from the defendant on December 19 that Mr. Meldahl could not appear until next Tuesday (R. 441) which would have been Christmas Day. However, although the trial was postponed from Friday, December 21 until Wednesday, January 2, 1952, Mr. Meldahl did not appear at any time.

On December 19, 1951, Louis Fleischer came from New York and consented to enter the case but when refused a sixty-day postponement, declined.

[fol. 67] In addition, the Court offered defendant the services of four members of the Allegheny County Bar, namely, Albert Martin, Esq., William Doty, Esq., Carl Blanchfield, Esq., and Harry Glick, Esq. Mr. Martin later declined but Mr. Doty and Mr. Blanchfield were willing to proceed. However, the defendant declined their services. Mr. Glick requested a thirty-day postponement but was informed he would have five days and additional time over the holiday. However, he did serve the defendant in the selection of the jury, following S. Pearse O'Connor, Esq., who started to do so at the court's request, but who had to retire due to being engaged in another case. Again, before the opening of the case to the jury, the Court offered the defendant the services of Mr. Glick (R. 441-442) but they were declined.

The defendant was not alone in his trial; Mr. Schlesinger was present in the court room many times for long intervals; representatives of the Abraham Lincoln Brigade and the Civil Rights Congress came from New York and Philadelphia and interceded for the defendant; the Daily Worker representative was always present. The edition of the Daily Worker of February 1, 1952, attached to one of the petitions on file, quotes the defendant as thanking his friends and comrades, as well as the Abrahame Lincoln Brigade and the Civil Rights Congress for their help in his trial. We make reference to this to show that this defendant was not the ignorant, youthful or otherwise incapacitated or neglected type of individual whose trial without counsel might be declared to be unfair and a deprivation of his rights contrary to the Fourteenth Amendment as intended for protection by cases as Gibbs v. Burke, 337 U. S. 773 (69 Sect. 1247) and Uveges v. Commonwealth of Pa.,

335 U. S. 437, 69 S. Ct. 184). As we view defendant's action, he purposely dispensed with counsel at his first trial [fol. 68] as well as at his second for his own reasons which we do not deem it necessary to discuss. Since he did so understandingly and the court afforded him ample opportunity both before and during the trial to be represented, he may not now complain. A person has a right to do without an attorney if he desires, U. S. v. Dennis, opinion by Hand, C. J., 183 F. 2d 201 (234).

Further, it may be said this entire matter was presented to the Pennsylvania Supreme Court in his petition for Writ of Prohibition and rejected when that court refused the Writ. This was at the very beginning of the trial.

[fol. 69] VI. There Were No Prejudicial Trial Errors

It was not error to sustain the objection to the question eliciting the total amount of the earnings of Matthew Cvetic. The jury was fully informed that he had received compensation which he shared with others for an article he had supplied to a magazine and for moving picture rights. This was sufficient to attack his credibility without a disclosure of amounts of money actually received.

As to the witness, Dr. Apteker,—after he made a general statement that he knew of no communist who had ever been convicted for advocating the use of force to overthrow government, he was asked if he knew about those who had been convicted in New York in the case of Dennis v. United States. He replied that he did, but that they had not been convicted of advocating the overthrow of government by force but for conspiracy. The prominence of the New York trial was so extensive that it must be presumed the jury had already known of it so that the mention of it would not be prejudicial to defendant. However, the explanation given by the defendant was such as to support rather than adversely affect his credibility, and was therefore not prejudicial.

As to the charge of the Court,—there was no need for the jury to make an election of various acts in support of the indictment. As we have already pointed out, the indictment is sustainable on the basis of a continuing crime. The indictment charged him with commission of the offenses on

before and after a specified date, originally July 19, 1950, and by amendment, August 31, 1950. In the citation to which defendant refers us in 23 C. J. S. 432, Criminal Law, Sec. 1044, this is recognized: "The principle of election is applicable however only where there is evidence of separate and distinct transactions, otherwise an election will not be [fol. 70] required." State v. Laundy, 103 Ore. 443, 204 Pa. 958, relied on by defendant, also recognizes the situation of several transactions constituting the same offense.

The charge did inadvertently state the period of the indictment to extend from August 31, 1948 to August 31, 1950, instead of October 17, 1948 to October 17, 1950, thereby including evidence from August 31, 1948 to October 17, 1948 and excluding the period from August 31, 1950 to October 17, 1950. However, since there is ample evidence to describe defendant's actions, intentions, associations, etc., from October 17, 1948 to August 31, 1950, to sustain the indictment, this error would not justify a new trial.

There is no merit in defendant's argument that because Clause (e) of the Act may have been read to the jury that the jury was permitted to find defendant guilty on a charge not prefered. A reading of the charge shows clearly that this issue was not submitted and that the charges were limited to the other sections of the Statute.

The charge concerning the credibility of defense witness Ben Carrothers was not erroneous. This witness was a convicted and sentenced perjuror as well as an associate of the defendant in the Communist movement. His testimony was, because of his conviction, not admissible under Sect. 322 of Act 1939, June 24, P. L. 872, 18 P. S. 4322. However, his record was not presented until after he had testified at length (R. 2258 to 2375) and his testimony was permitted to remain under instruction explaining the interest of the witness and the general purpose of admitting evidence of prior convictions for felonies and misdemeanors crimen falsi,—the jury was then told it should give particular attention to the fact that it was the testimony of one convicted of perjury which ordinarily precluded the witness [fol. 71] from giving any testimony. However, the jury had the benefit of the testimony and was given the election of accepting it or rejecting it and in this respect it was a benefit to defendant, rather than exclude it entirely. De-

fendant argues that had the testimony been rejected he could have offered another witness. This appears to be a weak argument in view of the facts. Defendant knew of the past record of the witness and stated he thought the disqualification was only for ten years (R. 2376), nevertheless, he offered him as his witness and accomplished the most he could hope for. He was, therefore, not surprised by the action of the Court and could have offered another witness had he so desired but he did not do so. Our reading of II Wigmore 617, Sec. 524, cited by defendant does not show us the instruction was erroneous.

Complaint is also made of heated and inflammatory remarks being made by witnesses and the district attorney. An examination of the record indicates that many times they were due to provocation by defendant. It also shows that the Trial Judge admonished both sides and their witnesses without distinction and that the jury was instructed to eliminate such remarks and altercations from their consideration of the case. The fact that they deliberated for twenty-one hours is some proof that the alleged inflammatory remarks had no effect.

Defendant's motion to examine the record of the Grand Jury was refused on authority of Commonwealth v. Judge Smart, 368 Pa. 630; "That an indictment, regularly found and returned to the court, should be impeached by the testimony of the grand jurors who found the Bill is a proposition that cannot be sustained."

The defendant's motion for a change of venue was refused by the Trial Judge in the first trial and his action was [fol. 72] sustained on appeal. In the present case, the same motion was presented (being in fact a duplicate copy of the motion presented at the first trial) and refused because of the previous action of our Appellate Court and for the further reason that there were no additional reasons of sufficient importance to support it. The effort of defendant to secure counsel has been discussed, the publicity was no more unfavorable or extensive, the public feeling had subsided as it generally does in the re-trial of any matter, and the role of M. A. Musmanno (acting as an individual) was the same. Nor can we justify a change of venue because additional charges may be preferred against an accused, whether in the same or any other court. In our opinion,

there is nothing to indicate that the public of Alleghen County considered the defendant or the subject matter o the case more important or were more concerned or a quainted with him or it than the public in any other count of the Commonwealth. In fact, there was the great poss bility that the general public of Allegheny County ma have been less acquainted or less concerned because of th size of the county and its population than that of a small county to which the case might have been sent. Ever effort was made by the Trial Judge to handle it as any othe case that arose and required trial, without emphasis o particular notice.

Lastly, the alleged prejudice and bias of the Trial Judg is given as a reason for defendant's motion. This is due t his membership in an organization called, "American Battling Communism", chartered by the Courts of thi County Nov. 22, 1947 with the purpose set forth below:

> "This association, to be duly incorporated under th laws of the Commonwealth of Pennsylvania as a non profit corporation, is established for the purpose o combining the efforts of recognized American organiza tions and societies dedicated to the preservation of con stitutional government in the United States and t block the inroads made by the communist agencies and to formulate and execute a more definite and ag gressive program for enlightening the American peopl as to the purpose, the methods and the agencies of th communist organization to the end that an enlightene and alerted public opinion shall take steps, including the adoption of security legislation, as may be neces sary to eliminate the threat posed by communism to th American way of life."

[fol. 73] At the time of trial, the Trial Judge was inactive and his interest was merely as a supporting but non-attend ing member. At the inception, he had been an officer and late a director. However, he was without knowledge that any money had been given to the witness Matthew Cvetic or that any other member had any financial arrangements with said witness or that any member of the organization had participated in the arrest of defendant or in the prepara

tions for his trial. Before undertaking the trial, he discussed the situation with two of his colleagues, Judges John J. Kennedy and Russell H. Adams, both assigned to the Criminal Court Branch at the time, and being satisfied in his own mind that regardless of his feeling toward Communism, he was not biased or prejudiced against the defendant, he presided. He was satisfied that he was in the same position and had the same mental outlook as expressed by Chief Justice Drew in Schlesinger Petition, 367 Pa. 476 (81 A. 2d 536):

> "It need hardly be stated that this Court is as opposed to Communism in all its manifestations as the respondent Judge. But it is our sacred duty to uphold the Constitution and laws of our County and State and their provisions as to due process of law."

To the Trial Judge, his membership in Americans Battling Communism was similar to a veteran's membership in any of the veteran organizations opposing totalitar-ism, or as a churchman's membership in his church opposing atheism.

We are therefore of the unanimous opinion that the defendant had a fair trial and that he has been duly convicted on all of the counts of the indictment, in accordance with constitutional requirements.

The motions for a new trial and arrest of judgment will both be refused and the verdict of the jury sustained.

[fols. 74-80] In the Court of Quarter Sessions of Allegheny County

Order Refusing Motions for New Trial and in Arrest of Judgment—June 26, 1952

And Now, to-wit, June 26th, 1952, the within matter having come before the court en banc, after argument and consideration of briefs, defendant's motions for a new trial and in arrest of judgment are hereby refused; defendant is directed to appear before the court for sentence forthwith.

By the Court (Signed) H. M., J.

Ex Dec. Exception noted to defendant and bill sealed.

(Signed) H. M. Montgomery, Judge. (Seal.)

[fol. 91] In The Superior Court of Pennsylvania, April Term, 1952

No. 179

Commonwealth of Pennsylvania

v.

Steve Nelson, alias Louis Evans, alias Joseph Fleischinger, alias "Hugo," alias Steve Mesarosh, Appellant

Appeal from the Judgment of the Court of Quarter Sessions of the Peace of Allegheny County, No. 764, October Sessions, 1950.

No. 60

Per Curiam Filed—November 12, 1952.

Defendant was found guilty of sedition (Act of June 24, 1939, P. L. 872, § 207, 18 PS § 4207). He has appealed from the judgment of sentence.

We are of the opinion that the case was fairly tried by Judge Montgomery. We find no reversible error. The judgment is affirmed on the opinion of Judge Montgomery.

Judgment affirmed.

[fol. 92] In The Supreme Court of Pennsylvania, Western District

Commonwealth of Pennsylvania

v.

Steve Nelson, Appellant

Opinion of The Court—January 25, 1954

Jones, J.

The appellant Nelson was convicted in the Court of Oyer and Terminer of Allegheny County on all twelve counts of an indictment charging him, inter alia, with an attempt to overthrow the government of the United States by force and violence contrary to the Pennsylvania Sedition Act of 1919, reenacted as a part of Pennsylvania's

Criminal Code of 1939; see Section 207 of the Act of June 24, 1939, P.L. 872, 18 PS §4207. The prosecution's evidence consisted in large part of proof of the defendant's membership and official position in the Communist Party, his attendance at Party meetings and the introduction of a mass of documentary evidence consisting of books, papers and pamphlets advocating, teaching or promulgating Communist doctrine, found in the Party headquarters and bookstore in Pittsburgh of which the defendant was a supervising principal. The defendant's motions for a new trial and in arrest of judgment were denied by the court en banc in an opinion written by the trial judge. Nelson was thereupon sentenced to pay a fine of $10,000, the costs of prosecution (amounting in taxable items to $13,000) and to undergo imprisonment for a term of 20 years. On appeal from the judgment of sentence, the Superior Court affirmed *per curiam*: see 172 Pa. Superior Ct. 125, 151, 92 A. 2d 431. Upon petition of the defendant, we allowed an appeal as our statute required us to do because of the constitutional [fol. 934] questions involved: see Act of Assembly of June 24, 1895, P.L. 212, Sec. 7 (c), 17 PS §190; also *Commonwealth v. Gardner*, 297 Pa. 498, 499, 147 A. 527, and *Commonwealth v. Caulfield*, 211 Pa. 644, 61 A. 243.

In support of his motion for a new trial, the appellant, in addition to his contentions on constitutional grounds,[1] cites

[1] Among the constitutional questions which the appellant raises is his assignment of the trial court's submission to the jury of the four counts of the indictment based upon the allegedly unconstitutional subdivision (c) of the Act which defines "sedition" as "Any writing, publication, printing, cut, cartoon, utterance, or conduct, either individually or in connection or combination with any other person, the intent of which is: * * * (c) To incite or encourage any person to commit any overt act with a view to bringing the Government of this State or of the United States into hatred or contempt": 18 PS §4207. The court en banc approved the trial judge's charge to the jury in this connection and rejected the attack on the constitutionality of subdivision (c) on the ground that both this court and the Superior Court had upheld the Act as valid. Such, how-

numerous instances of alleged trial error which raise ser
ous questions as to whether his conviction resulted from
fair and impartial trial, one devoid of bias and prejudic
As the defendant has, at all times, admitted his membe
ship and position in the Communist Party, obviously h
views are so extremely unpopular with a vastly preponde
ant majority of the citizenry of our Country as to amou
[fol. 94] virtually to an anathema in the public mind. Th
very circumstance makes it especially incumbent upon
court, in reviewing the conviction of such a person for a
alleged offense against the body politic, to scrutinize th
record with utmost care to see that he received a trial tha
fully comports with our concept of traditional due proces
—quite apart from any question of trial error in the ac

ever, is plainly not so. In *Commonwealth v. Widovic*
295 Pa. 311, 316, 145 A. 295, where the constitutionality
the State Sedition Act of 1919 was dealt with, this cou
expressly excluded subdivision (c) from consideration, say
ing, "Our immediate discussion will deal with all the for
going paragraphs [(a) to (h) incl.], with the exception
paragraph (c); no charge was laid thereunder, and it wi
not be considered." Likewise, in each of the Superio
Court cases cited by the court below, subdivision (c) wa
notably not involved: see *Commonwealth v. Lazar*, 103 Pa
Superior Ct. 417, 419-420, 157 A. 701, and *Commonwealt*
v. *Blankenstein*, 81 Pa. Superior Ct. 340, 346. At the earlie
trial of Nelson's co-indictees (Onda and Dolsen) unde
separate indictments identical with the one here involve
(all three indictments having been returned by the sam
grand jury simultaneously), the judge who presided a
that trial withdrew from the jury's consideration the fou
counts based on subdivision (c), holding that provision t
be unconstitutional. This constitutional question has neve
been passed upon by either of our appellate courts. Se
State v. Klapprott, 127 N.J.L. 395, 22 A. 2d 877, wher
"hatred", inter alia, as a condemned product of incitin
speech was held to be constitutionally too vague and in
definite to support a penal sanction; and *Whitney v. New*
York, 333 U. S. 507, 516-517, where *State v. Klapprott*
supra, was cited and quoted with approval.

mission or rejection of evidence or in alleged excesses or deficiencies in the court's instructions to the jury.

Thus, the appellant charges that he was refused a reasonable postponement of the trial, which he sought in order to pursue his effort to obtain counsel, and was thereby denied due process of law, citing *Powell v. Alabama*, 287 U.S. 45; that the trial judge, who was an incorporator, officer and member of the executive committee of a local nonprofit corporation, known as "Americans Battling Communism", which had publicly denigrated the defendant's indictment, deprived him of due process by refusing to disqualify himself, citing *Tumey v. Ohio*, 273 U.S. 510, 534, and *Snyder's Case*, 301 Pa. 276, 290, 152 A. 33; that the prosecutor in the information upon which the indictment was founded and chief witness against the defendant at the trial was a member of the same court in which the indictment was returned and the trial had; and that the district attorney indulged in improper, prejudicial and inflammatory remarks throughout the trial and, particularly, in his address to the jury. These and other matters of fundamental importance to a question of due process, if true, appear to have sufficient factual basis in the record to require that they be pondered conscientiously and well before being passed over as unsubstantial.

But, with any or all of that, we need not now be concerned. The appellant's principal and cogent contention is that the Pennsylvania Sedition Act was suspended by operation of law upon the enactment by Congress of Title [166; 95] I of the Act of June 28, 1940, c. 439, 54 Stat. 670, known as the Smith Act [2] which defines sedition against the United States and prescribes punishments therefor. If the Pennsylvania Act was so superseded, then the defendant's conviction cannot be sustained. Accordingly, we are met at the outset with this question which was pressed timely in the trial court, was urged upon the Superior Court on appeal and has been stressed before us. In our opinion, the con-

[2] Revised June 25, 1948, c. 645, 62 Stat. 808, 18 U.S.C. 2384-2385, as part of the division and codification of Title 18 of the United States Code entitled "Crimes and Criminal Procedures".

tention is well founded. Consequently, the motion in arrest of judgment should have been granted and the indictment quashed.

The question is obviously one of greatest importance. It not only revolves about a serious offense allegedly committed against the Government of the United States but it also calls for a consideration and understanding of the relationship between the Federal Government and the several States and the limitations upon the actions of each in respect of the other. As the question is basic to the appeal, our plain and immediate duty, therefore, is to decide it in accordance with what we take to be the applicable and controlling principles of law as declared by the Supreme Court of the United States. Article VI of the Federal Constitution provides that "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Under our federal system, as is generally known, there are functions of government which a State may not exercise because such matters have been committed, either expressly or impliedly, by the Constitution of the United States to the care of the Federal Government: see *Tennessee v. Davis*, 100 U.S. 257, 266. A State may not, for instance, [fol. 96] set up its own postal system, coin money, impose duties on imports or exports, declare war, make treaties or do a number of things which are exclusively within the federal province. There are, however, other matters with respect to which both the Federal Government and a State may concurrently legislate. But, even there, if the inference is reasonably deducible that it was the purpose of Congress by its enactment to pre-empt the particular field, State legislation on the same subject is automatically suspended. This is so regardless of the validity in general of the state statute which is simply superseded and, thus, rendered inefficacious so long as the federal statute endures.

The criteria for determining the congressional purpose in such connection may be evidenced in several ways as was

indicated by the Supreme Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, where it was said that "The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Pennsylvania R. Co. v. Public Service Comm'n*, 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject: *Hines v. Davidowitz*, 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission*, 236 U.S. 439; *Charleston & W.C.R. Co. v. Varnville Co.*, 237 U.S. 597; *New York Central R. Co. v. Winfield*, 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co.*, *supra*. Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida*, 325 U.S. 538."

As was also recognized in the *Rice* case, supra, "It is often a perplexing question whether congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide." [fol. 97] But, the congressional purpose to pre-empt a particular field is not made to depend upon a positively expressed legislative intent to that end. Such purpose can as readily be evidenced objectively by what the circumstances reasonably indicate as being necessary for the complete and unhampered effectuation of the federal aims and objectives. "For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and *that which needs must be implied is of no less force than that which is expressed*": *Savage v. Jones*, 225 U.S. 501, 533 (Emphasis supplied). So readily does the inference of federal preemption arise, when the National Government and a State enter the same field of legislative activity, that concurrent power to enforce the Eighteenth Amendment to the Federal Constitution was expressly included therein in order that it be not inferred that the power of the Federal Government in such regard was exclusive even though "each State possessed that

power in full measure prior to the Amendment" and the Federal Government did not. Such was the observation made by Mr. Chief Justice Taft in speaking for the Supreme Court in *United States v. Lanza*, 260 U.S. 377, 381, when he said, "* * * the probable purpose of declaring a concurrent power to be in the States was to negative any possible inference that in vesting the National Government with the power of country-wide prohibition, state power would be excluded."

In *Hines v. Davidowitz*, 312 U.S. 52, the Supreme Court held Pennsylvania's Alien Registration Act of June 21, 1939, P.L. 652, 35 PS 1801, et seq., to have been suspended by Title III of the Act of Congress of June 28, 1940, c. 439, 54 Stat. 670, 673, cited as the "Alien Registration Act, 1940" although the federal statute contained no express [Fol. 98] declaration of congressional intent to supersede. (Incidentally, the Act of June 28, 1940, supra, whose Title III thus operated to suspend the Pennsylvania Alien Registration Act of 1939, is the same Act whose Title I, i.e., the Smith Act, is here involved as to its effect upon the Pennsylvania Sedition Act of 1939.) The grounds upon which the Supreme Court based its conclusion of federal preemption in the *Hines* case were (1) that the state legislation relating to local registration of nationals of foreign governments might involve international relations which, from the first, have called for broad national authority and (2) that such legislation dealt "with the rights, liberties, and personal freedoms of human beings", a field wherein the protection of such rights against unlawful invasion by a State depends ultimately upon the guarantees of the Fourteenth Amendment of the Federal Constitution. What *Hines v. Davidowitz* decided, as later appraised by the Supreme Court itself in *Rice v. Santa Fe Elevator Corp.*, supra, was that "the [Alien Registration] Act of Congress * * * touch[ed] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."

On the basis of the Supreme Court decisions, the following propositions may, we believe, be reasonably postulated. (1) A federal legislation can and sometimes does supersede state legislation even though cognate congressional intent has not been expressly declared; and (2) in the

course of years there has grown up from many federal decisions on the subject of congressional statutory supersession of state legislation categories of situations in which such supersession occurs. The answer, then, to the question [fol. 99] of suspension of state legislation in a case such as the present depends upon whether the facts of the case fit the specifications of any such categories.

One of the categories of supersession is when the field, in which both the Federal Government and the State have legislated, is of paramount importance to the Federal Government. What federal interest, it may be asked, could be more dominant than maintenance of the security of the Federal Government itself which the Smith Act was designed to vouchsafe against subversive political assaults? And what could be more hampering to the exercise of federal power in such connection than to have a State assume to prosecute what is in truth an affront to the National Government? We have already referred to the powers of the Federal Government derived through state concession, either expressly or impliedly, upon the adoption of the Constitution. But, wholly apart from that, the Federal Government has at all times possessed the *inherent* right to protect and defend itself against enemies domestic as well as foreign. The old saying that "Self preservation is the first law of nature" is as true of nations as it is of animal life. When, therefore, a State assumes to punish, as does the Pennsylvania statute here involved, sedition against the United States, it is intruding in a matter where the national interest is obviously paramount. It follows necessarily that the Federal Government's control of the field must be exclusive if it is to protect itself effectively and completely. And that means no sharing of the jurisdiction with the States.

The arrest of suspects by a State for indictment and trial on charges of sedition against the United States under a local statute could readily impair and even thwart the Federal Government's contemporaneous investigation of the alleged offenders. Indictees under the Pennsylvania statute, for example, might well be but a part of a larger group spread over a number of States. The appropriate place for [fol. 100] the indictment and trial of all such is best determined and selected by the Federal Government, alone, with

its national jurisdiction and policies. And, Congress enacting the Smith Act, must have so recognized.

A state's jurisdiction of crime can extend only to conduct within its borders. And, while the Pennsylvania statute proscribes sedition against either the Government of the United States or the Government of Pennsylvania, the only alleged sedition against the United States with which the instant case is concerned. Out of all the voluminous testimony, we have not found, nor has anyone pointed to, a single word indicating a seditious act or even utterance directed against the Government of Pennsylvania. Indeed it is difficult to conceive of an act of sedition against a State in our federated system that is not at once an act of sedition against the Government of the United States. The peace of the forty-eight component States. Conversely, the power of suppressing sedition within a State rests directly upon the Federal Government by virtue of Article IV, Section 4, of the Constitution which charges the National Government with the duty of guaranteeing "to every State in this Union a Republican Form of Government." This positive constitutional mandate Congress undertook to carry out when the original Smith Act (54 Stat. 671) by expressly making it a crime for anyone to advocate, etc. the overthrow or destruction by force or violence of "*any* government in the United States" (Emphasis supplied). The same intention was expressed in the 1948 revision of the Smith Act (62 Stat. 808) as being applicable to the attempted overthrow or destruction of "the government of the United States or any government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein * * *." Federal pre-emption could hardly be more clearly indicated.

[fol. 101] Nor is a State stripped of its means of self-defense by the suspension of its sedition statute through the entry of the Federal Government upon the field. There are many valid laws on Pennsylvania's statute books adequate for coping effectively with actual or threatened internal disturbances. As to the nationwide threat to all citizens embodied in the type of conduct interdicted by a sedition act, we are all of us protected by the Smith Act in a manner more efficient and more consistent with the welfare of our national welfare in all respects.

The difference in the penalties respectively prescribed by the Smith Act and the Pennsylvania Sedition Act strongly argues that it was not the congressional purpose that, after enactment of the Smith Act, conflicting or disparate state statutes on the same subject should be called into play for the punishment of sedition against the United States. Under the Smith Act, as revised in 1948, the maximum sentences prescribed are six years and ten years, depending upon the particular section of the Act under which conviction is had, i.e., Sec. 2384 or Sec. 2385 of Title 18 U.S.C. In the case now under review, Nelson received a sentence under the Pennsylvania statute of twenty years for his conviction of sedition against the United States. Such a disparity in the sentences prescribed for the same offense, if multiplied by further like instances from other States, could not help but confuse and hinder the attack of sedition which calls for uniform action on a national basis. Uniformity in the range of sentences imposable throughout the country for sedition against the Government of the United States is assured only by the exclusive use of the federal statute.

If conviction under the state's statute for sedition against the Government of the United States were permitted to be operative in the face of the Smith Act, then double punishment for the same offense would be possible. Indeed, on the Commonwealth's theory, if each of the other forty-[fol 162] seven States had a Sedition Act like Pennsylvania's, one chargeable with sedition against the government of the United States could be indicted, convicted and punished in any or all of such States as were able to obtain service of their criminal process upon him as well as by the Federal Government. In the present instance after the appellant's conviction and sentence in the State Court, he, among with others, was indicted in the District Court of the United States for the Western District of Pennsylvania under the conspiracy section of the Federal Criminal Code for conspiring to violate the Smith Act. All have since been convicted. Nelson

Act of June 25, 1948, c. 645, 62 Stat. 683, 701, 18 U.S.C. [fol]

receiving a sentence of five years. The acts proven in the Federal Court to effectuate the alleged conspiracy consisted practically the same matter as was offered against Nelson in the trial in the State Court. And, so, Nelson's offense has been independently passed upon by a Federal Court where it properly belongs. If the state conviction were to be upheld, the result would be that both the Federal Government and the States would punish the appellant for substantially the same alleged offense *against the United States*.

The court below cited *United States* v. *Lanza*, supra, which was concerned with the question of concurrent jurisdiction to enforce prohibition. That case obviously affords no support for the proposition that the Federal Government and the States have concurrent jurisdiction to punish sedition against the United States. The Eighteenth Amendment expressly provided that "The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation." We have already seen the reason for that precautionary reservation to the States. *Westfall* v. *United States*, 274 U.S. 256, also cited by the court below, is wholly irrelevant. The manager of a state bank member of the Federal Reserve was held to be criminally liable under both the Federal Reserve Act and the state law for his misapplication of the bank's funds. That was not a matter of the State punishing for a federal offense. The State's part was taking cognizance of and denouncing the separate affront to its own peace and dignity in the purely local offense of embezzlement while the Federal Government's concern was the vindication of the banking law to which the state bank was subject. Nor is *Fox* v. *Ohio*, 46 U.S. 410, authority for concurrent federal and state jurisdiction of the same offense. In that case there were two separate offenses, one federal and the other state. The *counterfeiting* was a crime against and constitutionally punishable solely by the Federal Government while the "dispositions of passing a false coin" was "a private wrong and a 'delict'" punishable by the State.

Gilbert v. *Minnesota*, 254 U.S. 325 (1920), affords no basis for concluding that the Smith Act did not operate to suspend Pennsylvania's Sedition Statute. In the *Gilbert* case a state statute made it unlawful "to interfere with or

discourage the enlistment of men in the military or naval forces of the United States or of the State of Minnesota." The view of counsel for the State, which the Supreme Court adopted, was that "The act * * * [did] not relate to the raising of armies for the national defense, nor to rules or regulations for the government of those under arms [a constitutionally exclusive federal power]. It [was] simply a local police measure, aimed to suppress a species of seditious speech which the legislature of the State ha[d] found objectionable." As the Supreme Court further observed, * * * the State knew the conditions which existed and could have a solicitude for the public peace, and this record justifies it. Gilbert's [anti-conscription] remarks were made in a public meeting. They were resented by his auditors. There were protesting interruptions, also accusations and threats against him, disorder and intimations of violence. And such is not an uncommon experience. On such occasions feeling usually runs high and is impetuous; there [fol. 104] is a prompting to violence and when violence is once yielded to, before it can be quelled, tragedies may be enacted. To preclude such result or a danger of it is a proper exercise of the power of the State." The irrelevancy of *Gilbert v. Minnesota* to a question such as is here presented was directly declared in *Hines v. Davidowitz*, supra, where the State's attorney general cited and relied upon the *Gilbert* case on the question of the suspension of Pennsylvania's Alien Registration Statute by the federal Alien Registration Act. In answer, the Supreme Court said (p. 67, fn. 18) that the *Gilbert* case was not "relevant to the issues here presented." On the basis of the foregoing, it seems clear that a State's exertion of its conceded power to punish a breach of the peace, as in the *Gilbert* case, does not carry with it the right to "conflict or interfere with, curtail or complement, the federal law or enforce additional or auxiliary regulations." *Hines v. Davidowitz*, supra.

No question of federal supersession of a state statute was in issue in *Pennis et al. v. United States*, 341 U. S. 906, and, indeed, none could have been. The *Pennis* case was concerned exclusively with prosecutions under the Sixth Article. No state statute was in any way involved. Nor was such question in issue when the Supreme Court upheld the validity of the state statutes in *Galvan v. New York*, 268 U. S. 652

(1925), and *Whitney v. California*, 274 U. S. 357 (1927). When the *Gitlow* and *Whitney* cases were before the Supreme Court, there was no federal statute proscribing sedition. The Sedition Act of 1918, contained in the Second Espionage Act (40 Stat. 553), had been repealed by Congress in 1921 (41 Stat. 1359, 1360), and it was not until the enactment of the Smith Act in 1940 that sedition was again made a federal crime. It is obvious, therefore, that a question of congressional supersession of a state statute in respect of the proscription of sedition against the United States could not have been raised between 1921 and 1940 [fol. 105] and, naturally, none was raised or considered in either the *Gitlow* or the *Whitney* case. And the same is equally true of *Commonwealth* v. *Widovich*, 295 Pa. 311, 145 A. 295 (1929), where appeals were dismissed and certiorari denied by the Supreme Court, sub nom., *Muselin* v. *Pennsylvania*, 280 U.S. 518 (1929); *Commonwealth* v. *Lazar*, 103 Pa. Superior Ct. 417, 157 A. 704, allocatur refused, 103 Pa. Superior Ct. xxv (1931), appeal dismissed, 286 U.S. 532 (1932); and *Commonwealth* v. *Blankenstein*, 81 Pa. Superior Ct. 340 (1923). The reason given by the Supreme Court for the dismissal of the appeals in the *Widovich* and *Lazar* cases was want of a substantial federal question. Certain it is that no question of federal supersession of the Pennsylvania Sedition Statute was or even could have been raised in those cases.

Unlike the Smith Act, which can be administered only by federal officers acting in their official capacities, indictment for sedition under the Pennsylvania statute can be initiated upon an information made by a private individual. The opportunity thus present for the indulgence of personal spite and hatred or for furthering some selfish advantage or ambition need only be mentioned to be appreciated. Defense of the Nation by law, no less than by arms, should be a public and not a private undertaking. It is important that punitive sanctions for sedition *against the United States* be such as have been promulgated by the central governmental authority and administered under the supervision and review of that authority's judiciary. If that be done, sedition will be detected and punished, if less, wherever it may be found, and the right of the individual to speak freely and without fear, even in criti-

ed of the government, will at the same time be protected.

The pre-eminence of the National Government [illegible] defending itself efficiently and effectively against [illegible] so evident as not to admit of argument. [illegible] 1961] pute. In enacting the Smith Act, Congress [illegible] have understood, and therefore have intended, that [illegible] federal legislation would supersede a state statute on the same subject. It will be recalled that in *Hines v. Davidowitz* one of the reasons for the supersession of the Pennsylvania Alien Registration Act by Title I of the Act of Congress of 1940 was that the state legislation affected civil rights, liberties, and personal freedoms of [illegible] Double and possibly multiple trials and punishments for the same offense would hardly do less. In *Bridges v. Oregon*, 299 U.S. 252, 265, Mr. Chief Justice Hughes, speaking for a unanimous Court, wisely counselled that "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." Surely no more impressive admonition could have been given to the judiciary of our country. If this counsel is to be heeded faithfully, it is essential that criminal sanctions for conduct hostile to our Federal Government be promulgated, imposed and controlled uniformly for the Nation as a whole. And that, only the central Government can accomplish.

The judgment is reversed and the indictment [illegible]

Mr. Justice Musmanno and Mr. Justice Arnold took no part in the consideration or decision of this case.

Mr. Chief Justice Stern, Mr. Justice Allen M. Stearne and Mr. Justice Childs filed concurring opinions.

Mr. Justice Bell filed dissenting opinion.

[fol. 967] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

v.

STEVE NELSON, Appellant

CONCURRING OPINION—January 25, 1954

MR. CHIEF JUSTICE STERN, MR. JUSTICE ALLEN M. STEARNE and MR. JUSTICE CHIDSEY concurring:

We concur in the foregoing opinion in its entirety.

Sedition against the United States is not a *local* offense. It is a crime against the *Nation*. As such, it should be prosecuted and punished in the Federal courts where the defendant has in fact been prosecuted and convicted and is now under sentence. It is not only important but vital that such prosecutions should be exclusively within the control of the Federal Government, and we are of opinion that this is required in order to harmonize the respective constitutional powers of the Nation and the several States. We assume that the question involved, being obviously one of national importance, will be finally determined by the Supreme Court of the United States.

[fol. 1084] IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA

v.

STEVE NELSON, Appellant

DISSENTING OPINION—January 25, 1954

BELL, J.

Congress has *not* once said that Pennsylvania's law or any State law on Sedition was superseded or invalidated. The Supreme Court of the United States has *never* said so. If there could be any doubt on the question and in my

opinion there is none—it should certainly not be resolved in favor of freeing one of the top leaders of the Communist party in America, who has just been convicted of plotting the destruction of our Country.

Sedition has been a crime under the law of Pennsylvania since 1861. The defendant was indicted, tried and convicted under the Pennsylvania Sedition Act of 1939 (P.L. 872, 18 PS 4207—which reenacted the Sedition Act of June 26, 1919, P.L. 639). The Sedition Act makes it a felony* (a) to make or cause to be made any outbreak . . . of violence against this state or against the United States; (b) to encourage any person . . . to engage in any conduct with the view of overthrowing or destroying . . . by any force or show or threat of force *the government of this state or of the United States.*"

The analogous decisions of the Supreme Court of the United States, the preservation of the police power of every Sovereign State in the United States, and—most important of all—the protection, safety and security of our Country [fol. 109] imperatively require that the Pennsylvania Sedition Act be sustained.

The majority base their Opinion upon two grounds—(1) Supersession, and (2) Double Jeopardy. They are both equally and clearly untenable.

1. *Supersession.*

The Tenth Amendment to the Constitution of the United States provides: "The powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively or to the people." The Federalist (No. XXXII) in speaking of the delegation of State power to the Federal Government, said (page 163): ". . . This exclusive delegation, or rather this alienation of state sovereignty, would only exist in three cases: where the constitution in express terms granted an exclusive authority to the union; where it granted, in one instance, an authority to the union, and in another, prohibited the states from exercising the like authority; and where it granted an authority

* Italics throughout, ours.

to the union, to which a similar authority in the states would be *absolutely and totally contradictory and repugnant*.

The majority opinion admits, as it must, that the Constitution does not grant exclusive authority to the Federal Government; it admits, as it must, that the Constitution does not expressly or even impliedly prohibit the States from legislating on the subject of Sedition; it merely claims that because Congress has recently legislated on the subject it thereby preempted the entire field of Sedition. This, as we shall see, is a non sequitur. Moreover, the Pennsylvania Sedition Act and the Smith Act are obviously complementary and not by the wildest stretch of the imagination can they be said to be contradictory or repugnant or conflicting.

The constitutionality of Pennsylvania's Sedition Act was sustained in *Commonwealth* v. *Lazar*, 103 Pa. Superior Ct. 417, 157 A. 701, appeal dismissed 286 U.S. 532, and in *Commonwealth* v. *Blankenstein*, 81 Pa. Superior Ct. 340; *Commonwealth* v. *Widovich*, 295 Pa. 314, 145 A. 295. In the latter case, several members of the Communist Party were indicted and convicted under a prior Sedition Act which was reenacted in 1939. This Court, after holding that the Sedition Act does not violate freedom of speech or any provision of the Federal Constitution, said (page 317): "... The legislature, under the police power, to preserve "the [fol. 110] State's republican form of government; to suppress insurrection and to maintain the safety, peace and order of its citizens, may enact laws to suppress acts or attempts to commit acts of violence toward the government; it may prohibit the teaching or advocacy of a revolution or force as a means of redressing supposed injuries, or effecting a change in government. See Buffalo Branch, Mutual Fire Ins. Corp. v. Breitinger, 250 Pa. 225; White's Appeal, 287 Pa. 259, and cases there referred to. It is true that section 7 is a part of the Bill of Rights, but overshadowing these rights is the authority of the government to preserve its existence under the police power. Article XVI of the Constitution says *the police power shall never be abridged*. This relates to all phases of its exercise. *The police power is the greatest and most powerful attribute of government*.

and the very existence of the State depends": 346 R.I. 183; District of Columbia v. Brooke, 214 U.S. 138; Bank v. Hassell, 219 U.S. 104; Eubank v. Richmond, 226 U.S. 137."

In *Wortex Mills v. Textile Workers U. of A.*, 362 Pa. 359, 366 A. 2d 851, we said: ". . . It is well to recall that a State or other Sovereign has a paramount right and an inescapable duty to maintain law and order, to protect life, liberty and property and to enact laws and police regulations for the protection and preservation of the safety, health and welfare of the people of the state or community: Carnegie-Illinois Steel Corp. v. U.S.W. of A., 353 Pa. 420, 426, 45 A. 2d 857; Westinghouse Electric Corp. v. United Electrical Workers, 353 Pa. 446, 460, 46 A. 2d 46.

"The power and duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted": Thornhill v. Alabama, 310 U.S. 88, 105; Carlson v. California, 310 U.S. 106, 113. The sovereign powers of a State should be protected and sustained except where restricted by the Federal or State Constitution and except where an "intention of Congress to exclude States from exerting their police power [is] clearly manifested." . . .": Allen-Bradley Local v. Wisconsin E.R. Board, 315 U.S. 740, 749."

In the *Allen-Bradley Local* case, supra, Mr. Justice Douglas, speaking for a unanimous Court, said (page 111 [fol. 749]): ". . . this Court has long insisted that an *'intention of Congress to exclude States from exerting their police power must be clearly manifested.'* Napier v. Atlantic Coast Line R. Co., 272 U.S. 605, 611, and cases cited: Kelly v. Washington, 302 U.S. 1, 10; South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177; H. P. Welch Co. v. New Hampshire, 306 U.S. 79, 85; Maurer v. Hamilton, 309 U.S. 598, 614; Watson v. Buck, supra."

In *Auto Workers v. Wisconsin Employment Relations Board*, 336 U.S. 245, 253, Mr. Justice Jackson, in sustaining an injunction against a union by a State Court of Wisconsin in matters affecting interstate commerce, said: ". . . the *'intention of Congress to exclude States from exercising their police power must be clearly manifested.'* "

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, the Court said (page 230): "Congress legislated here in a field

which the States have traditionally occupied. See Munn v. Illinois, 94 U.S. 113; Davies Warehouse Co. v. Bowles, 32 U.S. 144, 148-149. So we start with the assumption that *the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.*"

In *Reid v. Colorado*, 187 U.S. 137, the Supreme Court of the United States said (page 148): "*It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States*, even when it may do so, *unless* its purpose to effect that result is *clearly manifested.* This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the *repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*"

In *Missouri, Kansas & Texas Ry. Co. v. Haber*, 169 U.S. 613, the question arose as to whether a Kansas statute which made actionable the transporting into Kansas of fever-[fol. 112]-den cattle was superseded by a federal statute which established a Bureau of Animal Industry charged with control of transportation across state lines. The Supreme Court of the United States held that this federal legislation did not override the state statute and said (page 623): "May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be determined with reference to the settled rule that a statute enacted in execution of a reserved power of the State is *not to be regarded as inconsistent with an act of Congress* passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.*"

Kelly v. Washington, 302 U.S. 1, sustained the validity of a state statute authorizing a state to inspect tugboats plying the navigable waters of the United States and in a unanimous opinion, speaking through Chief Justice Hughes said (page 10): "The principle is thoroughly established that the exercise by the State of its police power, which

would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot be reconciled or consistently stand together.' Sinnot v. Davenport, 22 How. 227, 243; Missouri, K. & T. Ry. Co. v. Haber, 169 U.S. 613, 623, 624; Reid v. Colorado, 187 U.S. 137, 148; Crossman v. Lurman, 192 U.S. 189, 199, 200; Asbell v. Kansas, 209 U.S. 251, 257, 258; Missouri Pacific Ry. Co. v. Larabee Mills, 211 U.S. 612, 623; Savage v. Jones, 225 U.S. 501, 533; Atlantic Coast Line v. Georgia, 234 U.S. 280, 293, 294; Carey v. South Dakota, 250 U.S. 118, 122; Atchison, T. & S. F. Ry. Co. v. Railroad Commission, 283 U.S. 380, 392, 393; Mintz v. Baldwin, 289 U.S. 346, 350; Gilvary v. Cuyahoga Valley Ry. Co., supra."

[fol. 113] Certainly it cannot be said that the Smith Act and the Pennsylvania Sedition Act are repugnant or conflicting and cannot be reconciled or stand together; it is equally certain that the Smith Act does not clearly manifest a purpose and intent to supersede or suspend or invalidate the sovereign police powers of a State.

An examination, nay, even a casual reading of the Smith Act, makes the following facts crystal clear and irrefutable:

"(1) *The Smith Act and the Pennsylvania Sedition Act are complementary and not repugnant or conflicting;* (2) *the Smith Act does not directly or expressly prohibit the States from exercising their historic and traditional sovereign powers;* nor (3) *does it in or by any sentence or any word exclude or negate or supersede or nullify a State's Sovereign police powers;* nor (4) *does it in or by any sentence or any word manifest clearly or even indirectly any intention to assume complete and exclusive jurisdiction of the subject matter, viz., the crime of Sedition.* Those facts *alone* are sufficient to demonstrate the utter untenability of the majority opinion which, with nothing to support, holds [fol. 114] that the state police power has been superseded, abridged and destroyed.

But we shall pile Pelion upon Ossa. What was the law prior to the Smith Act (as established in the State Courts and by decisions of the Supreme Court); what were the conditions which caused its passage; what were the mischiefs it sought to remedy; and what are the dire results which will inevitably flow from the majority opinion?